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No. 11 Orig.

Office Supreme Court, U. S.
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APR 2 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
Attorneys.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable the Supreme Court of the United States:

The motion of Charley Webb respectfully shows to this Honorable Court as follows:

1.

That your petitioner, who is a citizen of the United States and of the State of Oklahoma, residing in the eastern district of said State, is unlawfully restrained of his liberty and held under arrest, in violation of the Constitution and laws of the United States, by the United States marshal for the Eastern District of Oklahoma, and is held and imprisoned in the county jail of Muskogee County, Oklahoma, under a void capias issued out of said United States Court for the Eastern District of Oklahoma, which capias was issued upon a void indictment returned into said court against your petitioner, charging him with introducing intoxicating liquor

into Craig County, State of Oklahoma, on the 23d day of January, 1912, from a point without the State of Oklahoma, which said indictment was returned under the act of January 30, 1897, Rev. St. 2139, relating to the sale of intoxicating liquor to Indians or its introduction into Indian country, which said act of January 30, 1897, was repealed by the Enabling Act of June 16, 1906, admitting Oklahoma into the Union, since which time said statute has had no application to Craig County, Oklahoma, where it is charged said intoxicating liquor was introduced, nor has Craig County been Indian country since the admission of Oklahoma, and therefore the said United States Court for the Eastern District of Oklahoma is wholly without jurisdiction of your petitioner or of said alleged offense.

2.

That on the 27th day of March, 1912, said United States District Court for the Eastern District of Oklahoma, upon the application of your petitioner, made in the form and manner as required by law, caused its writ of *habeas corpus* to issue requiring the said marshal to bring your petitioner into court instanter, together with his return upon said writ, and upon the hearing of said cause said writ was discharged and your petitioner held under said void capias, the court holding that the said United States District Court for the Eastern District of Oklahoma had jurisdiction of said alleged offense.

3.

That your petitioner has the following special reason for coming direct to this Honorable Court for a writ of *habeas corpus* and for his release, as follows:

That the Circuit Court of Appeals for the Eighth Circuit has heretofore decided the questions involved in your petitioner's petition against him, holding that the said act of

January 30, 1897, relating to intoxicating liquor, was not repealed upon the admission of Oklahoma into the Union, and that the part of the State of Oklahoma formerly the Indian Territory is still Indian country, and therefore, if application should be made to that court, the relief to which your petitioner is entitled would be denied.

4.

That there is herewith tendered, to be filed in this Honorable Court, a petition in due form of law for a writ of *habeas corpus* and for a writ of certiorari requiring the said the United States District Court for the Eastern District of Oklahoma to certify to this court, for a review and determination, the case of your petitioner, styled *Ex parte* Charley Webb, No. 1767, in which case your petitioner was denied his liberty, which petition herewith tendered recites fully the alleged cause of your petitioner's detention and contains the proceedings had in the said United States District Court.

Wherefore your petitioner prays that this Honorable Court may grant him leave to file his said petition for a writ of *habeas corpus*.

JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
Attorneys.

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APR 29 1912
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 11 Orig.

EX PARTE CHARLEY WEBB, PETITIONER.

Petition for Writ of Habeas Corpus and for Writ of Certiorari Requiring the United States District Court for the Eastern District of Oklahoma to Certify to the Supreme Court for its Review and Determination the Case of Ex Parte Charley Webb.

JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No.

EX PARTE CHARLEY WEBB, PETITIONER.

Petition for Writ of Habeas Corpus and for Writ of Certiorari Requiring the United States District Court for the Eastern District of Oklahoma to Certify to the Supreme Court for its Review and Determination the Case of Ex Parte Charley Webb.

To the Honorable the Supreme Court of the United States:

The petition of Charley Webb respectfully shows to this honorable court as follows:

1.

That your petitioner is a white man and not of Indian blood and is a resident and inhabitant of the city of Vinita, in the eastern district of the State of Oklahoma.

2.

That he is unlawfully restrained of his liberty and held under arrest by Grant Victor, as United States marshal for the eastern district of Oklahoma, in the county jail of

Muskogee county, State of Oklahoma, and that he has been and is now, so illegally restrained of his liberty by virtue of a certain capias or bench warrant issued out of said district court by the clerk thereof upon the order of said district court, which is in the following words and figures, to wit:

"THE UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

The United States of America to the Marshal of the Eastern District of Oklahoma, Greeting:

You are hereby commanded, that you take Charley Webb if he shall be found in your district, and him safely keep, so that you may have his body before the District Court of the United States of America for the Eastern District of Oklahoma to be held in Vinita in said district, before the judge of said court forthwith next, to answer unto a certain indictment for introducing liquor in Indian country which has been returned against him unto our said court, by the grand inquest of the United States in and for said district; and hereof fail not, and have you then and there this writ, with the return of your doings thereon.

Witness, the Hon. Ralph E. Campbell, judge of said court, at Vinita, in said district, this 8th day of March, A. D. 1912.

R. P. HARRISON, *Clerk.*
By D. F. DICKEY,
Deputy Clerk."

That said capias or warrant was issued upon the return into said district court of an indictment against your petitioner and one Otis Tittle, in which they were jointly indicted by the grand jury of said court and charged with the alleged offense against the United States of introducing intoxicating liquor into that part of the State of Oklahoma which was the Indian Territory, which indictment charges that said Otis Tittle and your petitioner did on the 23rd day of January, 1912, in the said eastern district of Oklahoma, in the county of Craig, State of Oklahoma, unlawfully intro-

duce from without the State of Oklahoma seventeen gallons of intoxicating liquor, which indictment, together with the endorsements thereon, is in the following words and figures, to wit:

"UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

In the District Court of the United States in and for the Eastern District Aforesaid, at the March Term Thereof, A. D. 1912, at Vinita, Oklahoma.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present, that Otis Tittle and Charley Webb, and each of them on the 23rd day of January, in the year 1912, in the said division of said district and within the jurisdiction of said court in Craig county in the State of Oklahoma, the same then and there being and constituting a portion of the Indian country of the said United States, did at the time and place aforesaid unlawfully, knowingly, wilfully and feloniously introduce, and attempt to so introduce and carry into the said Indian country, from without the said Indian country, seventeen gallons of spirituous, ardent and intoxicating liquor, to wit: alcohol, which said alcohol was by the said Otis Tittle and Charley Webb and each of them so introduced and carried into that portion of said Eastern District of Oklahoma so being then and there Indian country as above set forth and described, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FRANK LEE,
Ass't United States Attorney.

"Endorsed as follows: No. 654. District Court of the United States for the Eastern District of . The United States *vs.* Otis Tittle and Charley Webb. Indictment, introducing liquor into the Indian country. A true bill. John B. Baumert, foreman. Filed Mar. 6, 1912. R. P. Harrison, clerk U. S. District Court. Act Jan. 30, 1897. Witnesses, John Olson, C. H. Goodpasture, E. H. Redd, Vinita, Ok."

4.

That the facts upon which said indictment was returned and for which your petitioner is held were as follows, to wit:

The intoxicating liquors described in the indictment were shipped from the city of Joplin, State of Missouri, by way of the St. Louis & San Francisco Railway Company, a common carrier of interstate shipments, on petitioner's order consigned to him at the said city of Vinita, Oklahoma, and the same reached the said city of Vinita over said railway line in the course of ordinary transportation at the time of the alleged offense set forth in the said indictment, to wit: on the 23rd day of January, 1912. That in the said city of Vinita, in the said county of Craig, State of Oklahoma, and whilst said intoxicating liquors were being delivered by the transportation company to your petitioner within the city of Vinita, and whilst he was in the act of receiving the same in a public highway of said county and upon a public street of said city, and not upon restricted land, for the purpose of and with the intent of carrying and transporting said shipment along said public highway and through the streets of the said city of Vinita to a point within the said city of Vinita, Oklahoma, he was arrested, apprehended and held by a deputy United States marshal and was thereupon imprisoned and subsequently indicted. That Vinita is situate upon the original Government town site.

5.

That said Craig county, Oklahoma, constitutes a part of that county or territory which was the Cherokee Nation of Indians, which Nation occupied a tract of land or territory about seventy-five miles in width and about one hundred and twenty-five miles in length. That all of the lands of said Cherokee Nation have been either allotted to the individual citizens of the Cherokee tribe or sold by the United States for the benefit of the citizens thereof, and there has not been at any of the times mentioned in said indictment

any unallotted land in said Cherokee Nation, nor has there been any Indian country therein. That prior to the times mentioned in said indictment the tribal government of the Cherokee Nation and all the other members of the Five Civilized Tribes of Indians, to wit: the Creek, Seminole, Chickasaw, and Choctaw Nations, had ceased to exist in virtue of the various acts of Congress, except in mere form of law, for the purpose of final distribution of the property belonging to the enrolled citizens entitled to receive the same; and the affairs of the said Five Civilized Tribes were practically closed, all of the citizens of said tribes having become citizens of the United States and of the State of Oklahoma.

6.

That said indictment was returned and said arrest made and your petitioner is now held under said capias solely because of the contention upon the part of the United States and the officers of said district court as follows, to wit:

It is contended against your petitioner that the portion of Oklahoma formerly the Indian Territory did not cease to be Indian country on the admission of the State, nor did such admission affect the application to that part of the State of Rev. St. 2139, or of act Jan. 30, 1897, relating to the sale of intoxicating liquor to Indians or its introduction into Indian country, and further that the provisions of the Oklahoma Enabling Act of June 16, 1906, did not repeal said act of Jan. 30, 1897, prohibiting the introduction of liquor into the Indian country as applied to interstate shipments into that part of the State formerly the Indian Territory. On the other hand, your petitioner contends that the part of the State of Oklahoma formerly the Indian Territory, and particularly Craig county of said State, is not Indian country, and that the said United States law relating to intoxicating liquors was repealed by the provisions of law upon which Oklahoma was admitted. This application therefore presents for determination

the question of jurisdiction, your petitioner claiming that the United States Court in Oklahoma is wholly without jurisdiction to enforce against him said statute which has been repealed, and further contending that he is held as aforesaid in violation of the Constitution and laws of the United States, and without due process of law.

Your petitioner further represents that Congress by the act of June 16, 1906 (34 Stat. at L., 267, chap. 3335), made it a condition of the admission of Oklahoma into the Union as a State that it should provide by its constitution that the manufacture, sale, barter, giving away or otherwise furnishing, except as provided in said Enabling Act, of intoxicating liquors within those parts of the proposed State then known as the Indian Territory and the Osage reservation, and the other parts of the State which were Indian reservations on the 1st day of January, 1906, should be prohibited for twenty-one years from the date of the admission of the State into the Union, and that the State should enforce said provision in the State courts. That Oklahoma, by ordinance irrevocable, accepted the terms and conditions of said Enabling Act and incorporated in the constitution of the State of Oklahoma all and singular the provisions of said Enabling Act relating to the manufacture, sale, barter, giving away or otherwise furnishing of intoxicating liquors, following the very language of said Enabling Act and agreeing to enforce in the courts of Oklahoma said provisions of the Enabling Act with reference to intoxicating liquors. That at the election in the proposed State of Oklahoma when the Constitution of the State was submitted to popular vote there was also submitted a provision of State-wide prohibition, the same being a law applicable to all of the Territory within the State and containing all and singular the terms and conditions set forth in the Enabling Act with reference to intoxicating liquors; that said provision for State-wide prohibition together with the provisions containing the exact terms of the Enabling Act relating to intoxicating liquors was

adopted by popular vote and the same became and has been ever since a part of the constitution of the State of Oklahoma, and in virtue of said provisions the State of Oklahoma has throughout its entire territory enforced each and every provision relating to intoxicating liquors set forth in the said Enabling Act; that since the admission of Oklahoma into the Union the legislature of the State has by its acts of March 24, 1908, and March 11, 1911, strengthened said constitutional provisions and provided ways and means for the enforcement of the same so that at all the times mentioned in the said indictment the State of Oklahoma has enforced not only all of the terms of the Enabling Act relating to intoxicants, but many other strict provisions, all intended to protect against intoxicating liquors not only all of the citizens of the various Indian tribes, but also all the other inhabitants of the State of Oklahoma.

7.

That heretofore, to wit, on the 27th day of March, 1912, your petitioner filed in the United States District Court for the Eastern District of Oklahoma his duly verified petition for release upon writ of *habeas corpus*, praying that he might be discharged from said illegal restraint and alleging in his said petition all the facts hereinbefore set forth in paragraphs one, two, three, four, five, and six of this petition, copy of which is hereto attached, marked Petitioner's Exhibit A, and is made a part hereof.

8.

That, heretofore, to wit, on the 27th day of March, 1912, upon presenting his said petition for writ of *habeas corpus* in the United States District Court for the Eastern District of Oklahoma before the Hon. Ralph E. Campbell, judge of said court, it was ordered that writ of *habeas corpus* issue to the said S. G. Victor, United States marshal for the East-

ern District of Oklahoma, commanding that said marshal produce the body of your petitioner detained in custody together with the day and cause of his capture and detention, and have your petitioner before the Hon. Ralph E. Campbell, judge of said District Court of the United States, instanter, to do and to receive all and singular those things which the said the Hon. Ralph E. Campbell, judge of said district court, should then and there consider of him in this behalf, and further commanding the said United States marshal to then and there have said writ and his return thereof, a copy of which writ is hereto attached, marked Petitioner's Exhibit B, and is made a part hereof.

9.

That on the 27th day of March, 1912, in obedience to the aforesaid writ of *habeas corpus*, the respondent, S. G. Victor, United States marshal, brought the body of your petitioner before the said the Hon. Ralph E. Campbell, judge, in open court, and said marshal then and there returned said writ, showing that he held your petitioner under and by virtue of the capias and indictment aforesaid, and for no other reason, a copy of which return is hereto attached, marked Petitioner's Exhibit C, and is made a part hereof.

10.

That on the 27th day of March, 1912, after the return of said writ as aforesaid, and while your petitioner was in open court, came the said S. G. Victor, marshal, and William J. Gregg, United States attorney for the eastern district of Oklahoma, said United States attorney appearing for the United States, and, neither of them denying any of the allegations of facts set forth in your petitioner's petition, the parties signed and filed in open court a stipulation agreeing that the facts relating to your petitioner's arrest and detention and the facts relating to the introduction of said intoxicating liquors were as set forth in your petitioner's said peti-

tion for *habeas corpus,* which stipulation is hereto attached, marked Petitioner's Exhibit D, and is made a part hereof.

11.

That your petitioner's said application for writ of *habeas corpus* came on for final hearing on the 27th day of March, 1912, in the said United States District Court for the Eastern District of Oklahoma at Muskogee, before the Hon. Ralph E. Campbell, judge of said court, and upon said hearing of your petitioner's said petition, said writ and the marshal's return thereon, and said stipulation having been considered, the relief prayed for was denied, said writ of *habeas corpus* was discharged, and it was ordered that your petitioner be held by said marshal under the capias hereinbefore set forth to answer said indictment. A copy of said order discharging said writ is hereto attached, marked Petitioner's Exhibit E, and is made a part hereof.

12.

That your petitioner cannot obtain any relief whatever in the United States Circuit Court of Appeals for the Eighth Circuit, or in any other court except in the Supreme Court of the United States, because on the 24th day of November, 1911, the said the United States Circuit Court of Appeals for the Eighth Circuit, in the case of United States Express Company *vs.* Friedman *et al.,* reported in 191 Fed. Rep., p. 673, decided the exact questions involved in your petitioner's application adverse to the claims of your petitioner, holding, among other things, that the said Cherokee Nation and the territory formerly that of the Five Civilized Tribes is still Indian country, and that the admission of Oklahoma into the Union did not affect the application in that part of the State formerly the Indian Territory of the said act of June 30, 1897, relating to the sale of liquor to Indians and its introduction into that part of Oklahoma formerly the Indian Territory, and further held that the said act was not

repealed by the Enabling Act and the admission of Oklahoma into the Union; that the questions thereby decided by the United States Circuit Court of Appeals for the Eighth Circuit, which decision was final, are decisive of this application and of petitioner's rights herein, and if he should present this his application to the said United States Circuit Court of Appeals for the Eighth Circuit the relief sought would be denied him, because upon the authority aforesaid said court must deny your petitioner his liberty prayed for, and the said court would hold upon said authority that the said United States Court for the Eastern District of Oklahoma has jurisdiction of your petitioner's person and of the alleged offense.

Wherefore your petitioner respectfully prays—

First. That a writ of *habeas corpus* may issue, directed to the said S. G. Victor, United States marshal for the eastern district of Oklahoma, commanding him that he have the body of your petitioner by him imprisoned and detained, together with the time and cause of such imprisonment and detention, before this honorable court, to do and receive what shall then and there be considered concerning him, in pursuance of the statutes in such case provided, or that order to show cause for such detention be made.

Second. That a writ of certiorari may be issued out of and under the seal of this court, directed to the United States District Court for the Eastern District of Oklahoma, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said United States District Court for the Eastern District of Oklahoma in the said case therein entitled *Ex parte* Charley Webb, No. 1767, to the end that the said case may be reviewed and determined by this court, as provided by law, or that your petitioner may have such other and further relief in the

premises as to this court may seem appropriate, and that the said judgment of the United States District Court for the Eastern District of Oklahoma in said case, and every part thereof, may be reversed by this honorable court.

JAMES S. DAVENPORT.
THOMAS H. OWEN.
JOSEPH C. STONE.

CHARLEY WEBB,
Petitioner.

STATE OF OKLAHOMA,
Eastern District,
Muskogee County, ss:

Charley Webb, being duly sworn, deposes and says that he is the above-named petitioner; that he has read the foregoing petition and knows the contents thereof, and that the statements therein contained are true.

CHARLEY WEBB.

Subscribed and sworn to before me this 28th day of March, 1912, by Charley Webb.

[Seal Sumner J. Lipscomb, Notary Public, Muskogee County, Okla.]

SUMNER J. LIPSCOMB,
Notary Public, Muskogee County, Oklahoma.

My commission expires February 26, 1916.

Petitioner's Exhibit A.

In the United States District Court for the Eastern District of Oklahoma.

Ex parte CHARLEY WEBB, Petitioner.

Petition for a Writ of Habeas Corpus.

To the Honorable the District Court of said Eastern District of Oklahoma:

The petition of Charley Webb respectfully shows to this honorable court as follows:

1.

That your petitioner is a white man and not of Indian blood, and is a resident and inhabitant of the city of Vinita, in the Eastern District of the State of Oklahoma.

2.

That he is unlawfully restrained of his liberty and held under arrest by Grant Victor as United States marshal for the Eastern District of Oklahoma in the county jail of Muskogee County, State of Oklahoma, and that he has been and is now so illegally restrained of his liberty by virtue of a certain capias or bench warrant issued out of this court by the clerk thereof upon the order of this court, which is in the following words and figures, to wit:

"THE UNITED STATES OF AMERICA,
"Eastern District of Oklahoma, ss:

"The United States of America to the Marshal of the Eastern District of Oklahoma, Greeting:

"You are hereby commanded, that you take Charley Webb if he shall be found in your district, and him safely keep, so that you may have his body

before the District Court of the United States of America for the Eastern District of Oklahoma, to be held in Vinita, in said district, before the judge of said court forthwith next, to answer unto a certain indictment for introducing liquor in Indian country which has been returned against him unto our said court, by the grand inquest of the United States in and for said district; and hereof fail not, and have you then and there this writ, with the return of your doings thereof.

"Witness the Hon. Ralph E. Campbell, judge of said court at Vinita, in said district, this 8 day of March, A. D. 1912.

"R. P. HARRISON, *Clerk,*
"By D. F. DICKEY,
"Deputy Clerk."

3.

That said capias or warrant was issued upon the return into this honorable court of an indictment against your petitioner and one Otis Tittle, in which they were jointly indicted by the grand jury of said court and charged with the alleged offense against the United States of introducing intoxicating liquor into that part of the State of Oklahoma which was the Indian Territory, which indictment charges that said Otis Tittle and your petitioner did on the 23d day of January, 1912, in the said Eastern District of Oklahoma, in the county of Craig, State of Oklahoma, unlawfully introduce from without the State of Oklahoma seventeen gallons of intoxicating liquors; which indictment together with the endorsements thereon, is in the followings words and figures, to-wit:

"UNITED STATES OF AMERICA.
Eastern District of Oklahoma, ss:

"In the District Court of the United States in and for Eastern District Aforesaid, at the March Term Thereof, A. D. 1912, at Vinita, Oklahoma.

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the

court aforesaid, on their oath present, that Otis Tittle, and Charley Webb, and each of them on the 23rd day of January, in the year 1912, in the said division of said district, and within the jurisdiction of said court in Craig County in the State of Oklahoma, the same then and there being and constituting a portion of the Indian country of the said United States, did at the time and place aforesaid, unlawfully, knowingly, wilfully and feloniously introduce, and attempt to so introduce and carry into the said Indian country, from without the said Indian country, seventeen gallons of spirituous, ardent and intoxicating liquor, to-wit, alcohol, which said alcohol was by the said Otis Tittle and Charley Webb and each of them so introduced and carried into that portion of said Eastern District of Oklahoma so being then and there Indian country as above set forth and described, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"FRANK LEE,
"Ass't United States Attorney."

Endorsed as follows: "No. 654. District Court of the United States for the Eastern District of ——. The United States *vs.* Otis Tittle and Charley Webb. Indictment. Introducing liquor into the Indian country. A true bill. John B. Baumert, foreman. Filed Mar. 6, 1912. R. P. Harrison, clerk U. S. District Court. Act. Jan. 30, 1897. Witnesses, John Olson, C. H. Goodpasture, D. N. Reed, Vinita, Ok."

4.

That the facts upon which said indictment was returned and for which your petitioner is held were as follows, to-wit:

The intoxicating liquors described in the indictment were shipped from the city of Joplin, State of Missouri, by way of the St. Louis & San Francisco Railway Company, a common carrier of interstate shipments, on petitioner's order, consigned to him at the said city of Vinita, Oklahoma, and the same reached the said city of Vinita over said railway line,

in the course of ordinary transportation, at the time of the alleged offense set forth in the said indictment, to-wit, on the 23rd day of January, 1912; that in the said city of Vinita, in the said county of Craig, State of Oklahoma, and whilst said intoxicating liquors were being delivered by the transportation company to your petitioner within the city of Vinita, and he was in the act of receiving the same in a public highway of said county and upon a public street of said city, and not upon restricted land, for the purpose of and with the intent of carrying and transporting said shipment along and through the streets of the said city of Vinita to a point within the said city of Vinita, he was arrested and apprehended and held by a deputy United States marshal; was thereupon imprisoned and subsequently indicted; that Vinita is situate upon the original Government town site.

5.

That said Craig County, Oklahoma, constitutes a part of that country or territory which was the Cherokee Nation, which nation occupied a tract of land or territory about seventy-five miles in width and about one hundred and twenty-five miles in length. That all of the lands of said Cherokee Nation have been either allotted to the individual citizens of the Cherokee tribe or sold by the United States for the benefit of the citizens thereof, and there has not been at any of the times mentioned in said indictment any unallotted land in said Cherokee Nation, nor has there been any Indian country therein. That prior to the times mentioned in said indictment the Tribal Government of the Cherokee Nation and all the other members of the Five Civilized Tribes of Indians, to wit: The Cherokee, Seminole, Chickasaw and Choctaw Nations, had ceased to exist in virtue of the various acts of Congress, except in mere form a law, for the purpose of final distribution of the property belonging to the enrolled citizens entitled to receive the same;

and the affairs of the said Five Civilized Tribes were practically closed, all of the citizens of said tribes having become citizens of the United States and of the State of Oklahoma.

6.

That said indictment was returned and said arrest made and your petitioner is now held under said capias solely because of the contention upon the part of the United States as follows, to-wit:

That portion of Oklahoma, formerly the Indian Territory, did not cease to be Indian country on the admission of the State, nor did such admission affect the application to that part of the State of Rev. St., 2139, or of act of Jan. 30, 1897, relating to the sale of intoxicating liquor to Indians or its introduction into Indian country, and that the provisions of the Oklahoma Enabling Act of June 16, 1906, did not repeal said act of Jan. 30, 1897, prohibiting the introduction of liquor into the Indian country as applied to interstate shipments into that part of the State formerly the Indian Territory. On the other hand, your petitioner contends that that part of the State of Oklahoma formerly the Indian Territory, and particularly Craig County of said State, is not Indian country, and that the said United States law was repealed. This application therefore presents for determination the question of this court's jurisdiction, your petitioner claiming that this honorable court is wholly without jurisdiction to enforce said statute which has been repealed, and that he is held as aforesaid in violation of the Constitution and laws of the United States.

Your petitioner further represents that Congress by the act of June 16, 1906 (34 Stat. at L., 267, chap. 3335), made it a condition of the admission of Oklahoma into the Union as a State that it should provide by its constitution that the manufacture, sale, barter, giving away or otherwise furnishing, except as provided in said Enabling Act of intoxicating liquors within those parts of the proposed State then known

as the Indian Territory and the Osage reservation, and the other parts of the State which were Indian reservations on the 1st day of January, 1906, should be prohibited for twenty-one years from the date of the admission of the State into the Union, and that the State should enforce said provision in the State courts; that Oklahoma, by ordinance irrevocable, accepted the terms and conditions of said Enabling Act and incorporated in the constitution of the State of Oklahoma all and singular the provisions of said Enabling Act relating to the manufacture, sale, barter, giving away or otherwise furnishing of intoxicating liquors, following the very language of said Enabling Act and agreeing to enforce in the courts of Oklahoma said provisions of the Enabling Act with reference to intoxicating liquors; that at the election in the proposed State of Oklahoma when the constitution of the State was submitted to popular vote there was also submitted a provision for State-wide prohibition, a law applicable to all of the territory within the State and containing all and singular the terms and conditions set forth in the Enabling Act with reference to intoxicating liquors, and said provision for State-wide prohibition, together with the provision containing the exact terms of the Enabling Act relating to intoxicating liquors was adopted by popular vote and the same became and has been ever since a part of the constitution of the State of Oklahoma, and thereby the State of Oklahoma has throughout its entire Territory enforced each and every provision relating to intoxicating liquors set forth in the said Enabling Act. That since the admission of Oklahoma into the Union the legislature of the State has by its acts of March 24, 1908, and March 11, 1911, strengthened said constitutional provisions and provided ways and means for the enforcement of the same so that at all the times mentioned in the said indictment the State of Oklahoma has enforced not only all of the terms of the Enabling Act relating to intoxicants, but many other strict provisions beside, all intended to protect not only all of the

citizens of the various Indian tribes, but also all the other inhabitants of the State of Oklahoma.

Wherefore your petitioner respectfully prays that there may issue in his behalf the writ of *habeas corpus,* and that same may be served upon said United States marshal and that he be commanded to bring your petitioner before this honorable court there to receive such judgment as in the premises may be deemed proper, and that he may be discharged of said unlawful restraint of his liberty from which he is now suffering, and that he may recover his costs herein.

JAMES S. DAVENPORT,
J. C. STONE AND
SAMUEL EPPSTEIN,
His Attorneys.

STATE OF OKLAHOMA,
Eastern District, Muskogee County, ss:

Charley Webb, of lawful age, being duly sworn, deposes and says that he is the petitioner above named; that he knows the contents of this, his petition, and that the statements therein contained are true.

CHARLEY WEBB.

Subscribed and sworn to before me this 27th day of March, 1912.

[SEAL.] SUMNER J. LIPSCOMB,
Notary Public.

My commission expires Feb'y 26, 1912.

Endorsed as follows: Filed Mar. 27, 1912. R. P. Harrison, clerk U. S. District Court.

Petitioner's Exhibit B.

THE UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

To S. G. Victor, United States Marshal for the Eastern District of Oklahoma:

We command you that the body of Charley Webb, in your custody detained, as it is said, together with the day and cause of capture and detention, you safely have before Honorable Ralph E. Campbell, judge of our District Court of the United States, within and for the district aforesaid, instanter, to do and receive all and singular those things which the said Honorable Ralph E. Campbell, judge of our said district court, shall then and there consider of him in this behalf; and have you then and there this writ.

Witness the Honorable Ralph E. Campbell, judge of the said court, at Muskogee, in said district, this 27th day of March, A. D. 1912.

[SEAL.]

R. P. HARRISON, *Clerk.*
By D. F. DICKEY,
Deputy Clerk.

Which said writ is indorsed: "Filed in open court Mar. 27, 1912. R. P. Harrison, clerk."

Petitioner's Exhibit C.

In the United States District Court for the Eastern District of Oklahoma.

In the Matter of Application of CHARLEY WEBB for Release on *Habeas Corpus*.

To the Honorable Ralph E. Campbell, Judge of the said Court:

Your respondent, S. G. Victor, United States marshal for the eastern district of Oklahoma, in response to the order and writ of this court heretofore issued in this cause and served upon him, returns into court the writ, together with the body of Charley Webb, petitioner, with the following statement of facts relative to the detention of such petitioner by your respondent:

Your respondent shows that he is the duly appointed, qualified and acting United States marshal for the eastern district of Oklahoma; that the said petitioner was committed to his care by virtue of a certain warrant issued out of said court by the clerk thereof, upon order of said court, a copy of which said warrant is hereto attached and made a part hereof, said petitioner being now held by your respondent in his said official capacity as United States marshal and under and by authority vested in him by virtue of the warrant aforesaid.

Your respondent further states that heretofore, to wit, on the 6th day of March, 1912, the grand jury, duly empaneled, sworn, and then in session at Vinita, returned into said court a certain bill of indictment charging the said petitioner, Charley Webb, together with one Otis Tittle, with the crime against the United States of introducing spirituous, ardent, and intoxicating liquor into the Indian country, a copy of which said indictment is hereto attached and made a part hereof. That the warrant aforesaid under and

by virtue of which your respondent now holds said petitioner was issued by order of court upon said indictment.

Your respondent further shows that he has now in open court the body of said petitioner, there to be dealt with as upon the order of said court.

S. G. VICTOR,
United States Marshal for the Eastern District of Oklahoma.
By E. H. HUBBARD, *Deputy.*

E. H. Hubbard, deputy United States marshal, being duly sworn, on oath says he has read the above and foregoing return to the writ of *habeas corpus* served upon him in said cause and knows the contents thereof; that the matters therein alleged and stated are true in substance and in fact, as he verily believes.

E. H. HUBBARD.

Subscribed and sworn to before me this 27th day of March, A. D. 1912.

[SEAL.]

R. P. HARRISON,
Clerk United States District Court, Eastern District of Oklahoma.
By D. F. DICKEY, *Deputy.*

THE UNITED STATES OF AMERICA,
Eastern District of Oklahoma, ss:

The United States of America to the Marshal of the Eastern District of Oklahoma, Greeting:

You are hereby commanded that you take Charley Webb, if he shall be found in your district, and him safely keep, so that you may have his body before the District Court of the United States of America for the Eastern District of Oklahoma, to be held in Vinita, in said district, before the judge of said court, forthwith next, to answer unto a certain indictment for introducing liquor in Indian country which

has been returned against him unto our said court, by the grand inquest of the United States in and for said district; and hereof fail not, and have you then and there this writ, with the return of your doings thereon.

Witness the Hon. Ralph E. Campbell, judge of said court, at Vinita, in said district, this 8th day of March, A. D. 1912.

R. P. HARRISON, *Clerk*,
By D. F. DICKEY,
Deputy Clerk.

UNITED STATES OF AMERICA,
Eastern District of Oklahoma, —— Division, ss:

In the District Court of the United States in and for Eastern District Aforesaid, at the March Term Thereof, A. D. 1912.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, at Vinita, Oklahoma, of the court aforesaid, on their oath present, that Otis Tittle and Charley Webb, and each of them, on the 23d day of January, in the year 1912 in the said district, and within the jurisdiction of said court in Craig County, in the State of Oklahoma, the same then and there being and constituting a portion of the Indian country of the said United States, did at the time and place aforesaid unlawfully, knowingly, willfully, and feloniously introduce, and attempt to so introduce and carry into the said Indian country, from without the said Indian country, seventeen gallons of spiritous, ardent, and intoxicating liquor, to wit, alcohol, which said alcohol was by the said Otis Tittle and Charley Webb and each of them so introduced and carried into that portion of said Eastern District of Oklahoma so being then and there Indian country as above set forth and described, contrary

to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

WILLIAM J. GREGG,
United States Attorney.

Which said return is endorsed: "Filed in open court Mar. 27, 1912. R. P. Harrison, clerk."

Petitioner's Exhibit D.

In the United States District Court for the Eastern District of Oklahoma.

No. 1767.

Ex Parte CHARLEY WEBB, *Petitioner.*

Stipulation.

It is agreed by the parties in open court upon the hearing of this cause that the petitioner is a white man not of Indian blood, and that the facts recited in the fourth paragraph of petitioner's petition for writ of *habeas corpus* concerning the time and manner of the introduction of intoxicating liquor as charged in the indictment by the said Charley Webb and the circumstances surrounding the same are as set forth in said fourth paragraph of said petition.

It is also admitted in open court that the city of Vinita is in Craig County, State of Oklahoma, and that Craig County constituted a part of the country which was formerly the Cherokee Nation; that all of the lands of the Cherokee Nation have been either allotted to individual citizens of the Cherokee Tribe under the terms of the Cherokee agreement and the several acts of Congress providing for the allotment of said lands or sold by the United States for the bene-

fit of the citizens of the Cherokee Nation, either as townsites or otherwise, under the authority of the several acts of Congress providing therefor; that the city of Vinita and the place where the intoxicating liquor was delivered by the Frisco Railroad Company to the said Charley Webb is a part of the original townsite of Vinita, Indian Territory, and that the status of the lands and of the enrolled members of the Cherokee Tribe of Indians are such as are fixed by law.

(Signed) JAMES S. DAVENPORT,
JOSEPH C. STONE,
Attorneys for Petitioner.

(Signed) WM. J. GREGG,
United States Attorney.

Endorsed as follows: Filed in open court, Mar. 27, 1912. R. P. Harrison, clerk.

Petitioner's Exhibit E.

In the United States District Court for the Eastern District of Oklahoma.

No. 1767.

Ex Parte CHARLEY WEBB, *Petitioner.*

Order Discharging Writ.

On this the 27th day of March, 1912, coming on to be heard the petition of Charley Webb for release on *habeas corpus,* and now comes S. G. Victor, United States marshal for the Eastern District of Oklahoma, in response to the order and writ of this court heretofore issued in this cause and served upon him, and returns into court the said writ, together with the body of Charley Webb, the petitioner,

with a statement of facts relative to the detention of said petitioner by the respondent, and the said Charley Webb now being present in person in open court and also appearing by Joseph C. Stone, his attorney, and William J. Gregg, United States attorney, appearing for the United States, and this cause having been submitted to the court upon said petition for release on *habeas corpus*, which is duly verified by the petitioner, and upon the writ and response of said United States marshal and upon admitted facts made by the parties, and argument of counsel having been heard and the court being duly advised in the premises, finds that the facts set forth in the petition herein do not entitle the petitioner to the relief prayed for.

It is therefore ordered, adjudged, and decreed by the court—

1st. That the prayer of the petitioner be denied.

2d. That the writ heretofore issued herein be, and the same is, hereby discharged.

3d. That the respondent hold the petitioner under the capias set forth in his return, to answer the indictment against the petitioner.

4th. That the petitioner pay the costs herein.

To which judgment of the court the petitioner excepts.

(Signed) RALPH E. CAMPBELL,
District Judge.

Endorsed as follows: Filed in open court March 27, 1912. R. P. Harrison, clerk.

[16528]

AMENDED MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS AND BRIEF SUPPORTING SAME

Attorneys

Legal Record Publishing Co., Hamburg, Ohio

In the

SUPREME COURT *of the* UNITED STATES

October Term, 1911.

Ex Parte CHARLEY WEBB, *Petitioner.*

AMENDED MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF *HABEAS CORPUS.*

To the Honorable, The Supreme Court of the United States:

The amended motion of Charley Webb respectfully shows to this Honorable Court as follows:

1.

That your petitioner, who is a citizen of the United States and of the State of Oklahoma, residing in the Eastern District of said state, is unlawfully restrained of his liberty and held under arrest in violation of the Constitution and laws of the United States by the United States Marshal for the Eastern District of Oklahoma, and is held and imprisoned in the county jail of Muskogee County, Oklahoma, under a void *capias* issued out of said United States Court for the Eastern District of Oklahoma, which *capias* was issued upon a void indictment returned into said Court against your petitioner,

charging him with introducing intoxicating liquor into Craig County, State of Oklahoma, on the 23rd day of January, 1912, from a point without the State of Oklahoma, which said indictment was returned under the act of January 30, 1897, Rev. St. 2139, relating to the sale of intoxicating liquor to Indians or its introduction into Indian country, which said act of January 30, 1897, was repealed by the Enabling Act of June 16, 1906, admitting Oklahoma into the Union, since which time said statute has had no application to Craig County, Oklahoma, where it is charged said intoxicating liquor was introduced, nor has Craig County been Indian country since the admission of Oklahoma, and therefore the said United States Court for the Eastern District of Oklahoma is wholly without jurisdiction of your petitioner, or of said alleged offense.

2.

That on the 27th day of March, 1912, said United States District Court for the Eastern District of Oklahoma upon the application of your petitioner made in the form and manner as required by law caused its writ of *habeas corpus* to issue requiring the said Marshal to bring your petitioner into Court instanter together with his return upon said writ, and upon the hearing of said cause said writ was discharged and your petitioner held under said void *capias*, the Court holding that the said United States District Court for the Eastern District of Oklahoma had jurisdiction of said alleged offense.

3.

That your petitioner has the following special reason for coming direct to this Honorable Court for a writ of *habeas corpus* and for his release, as follows:

That the Circuit Court of Appeals for the Eighth Circuit

has heretofore decided the questions involved in your petitoner's petition against him, holding that the said Act of January 30, 1897, relating to intoxicating liquor was not repealed upon the admission of Oklahoma into the Union, and that the part of the State of Oklahoma formerly the Indian Territory is still Indian country, and therefore, if application should be made to that Court, the relief to which your petitioner is entitled would be denied.

4.

That there is herewith tendered to be filed in this Honorable Court a petition in due form of law for a writ of *habeas corpus* and for a writ of *certiorari* requiring the said the United States District Court for the Eastern District of Oklahoma to certify to this Court for a review and determination the case of your petitioner styled *Ex parte Charley Webb*, Number 1767, in which case your petitioner was denied his liberty, which petition herewith tendered recites fully the alleged cause of your petitioner's detention and contains the proceedings had in the said United States District Court.

5.

Your petitioner further respectfully represents that there are the following exceptional circumstances which demand interposition by this Honorable Court in advance of final adjudication in the lower courts of the United States, to-wit:

1st. If his said cause is tried he will be convicted, as is evidenced by the holding of the said United States District Court for the Eastern District of Oklahoma and the said decision of the United States Circuit Court of Appeals for the Eighth Circuit, and there will consequently be great delay before this Honorable Court may reach his said cause upon appeal and he will be deprived of his liberty in violation of the

Constitution and laws of the United States during said entire period of delay, or until he shall have served out his sentence.

2nd. That the expense necessarily incident to appeal to the Supreme Court after conviction below is so great that your petitioner is and will be wholly unable to provide the means for appeal.

3rd. That the matter presented by your petitioner's application is of general interest throughout the entire State of Oklahoma and specially that part of Oklahoma formerly the Indian Territory, and is of great interest to the government and ought to be determined at once for the following reasons, to-wit:

From the date of the admission of Oklahoma until your petitioner's arrest the United States Courts in Oklahoma did not assume to exercise jurisdiction in such matters during all of which time both the State and the Federal officers proceeded on the theory that said Act of January 30th, 1897, was repealed by the Enabling Act and the admission of the State. That the said decision by the Circuit Court of Appeals for the Eighth Circuit which was delivered on November 24th, 1911, caused the government to consider whether the United States Courts should attempt to exercise jurisdiction in the matter of the introduction and sale of intoxicating liquors in that part of Oklahoma formerly the Indian Territory and upon considering said decision by the Circuit Court of Appeals it was determined that said law should be enforced until such time as this Honorable Court should hold, if it should so hold, that the United States Courts have no jurisdiction in such matters, so that this new policy upon the part of the United States will entail the expenditure of many thousands of dollars in the prosecution of cases similar to this and in the meantime until

this Honorable Court shall have passed upon the question of jurisdiction here involved, the people of the entire State of Oklahoma, the officers of Oklahoma, and particularly the officers of the United States Court for the Eastern District of Oklahoma will not know and cannot know how this question will be finally determined, and your petitioner therefore most respectfully suggests that the public welfare demands a speedy disposition of the question here presented.

Wherefore, your petitioner prays that this Honorable Court may grant him leave to file his said petition for a writ of *habeas corpus*.

JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
His Attorneys

State of Oklahoma, Muskogee County.—ss.

Charley Webb being first duly sworn, upon oath states: I have read the foregoing amended motion and know the contents thereof; the statements therein made are true.

CHARLEY WEBB.

Subscribed and sworn to before me this 12th day of April, 1912.

SUMNER J. LIPSCOMB,

(Seal) *Notary Public.*

My commission expires February 26th, 1916.

MEMORANDA BRIEF

May it please the Court:

This Honorable Court should inquire with regard to the jurisdiction of the inferior court both on account of the exceptional circumstances of the case which entitle the petitioner to immediate relief and because a speedy settlement of the question involved is necessary to the orderly administration of justice throughout the state of Oklahoma and particularly in that part of the State formerly the Indian Territory. (See paragraph five of petitioner's motion for leave to file application.)

Ex parte Nielson, 131 U. S. 176; 33 L. ed. 118
In re Mayfield, 141 U. S. 107;
In re John Bonner, 151 U. S. 24; 38 L. ed. 149;
Ex parte Albert Siebold, 10 Otto 371; 25 L. ed. 717;
In the matter of Schneider, 148 U. S. 162; 37 L. ed. 406;
U. S. Supreme Court Practice by May, p. 440.

In the case of *ex parte Nielson, supra*, this Court said:

"The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in *Ex parte Siebold*, 100 U. S. 371, 375 (25:717), and is illustrated by the case of *Ex parte Parks* as compared with the cases of *Lange* and *Snow*. In the case of *Parks* there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of *Lange* and *Snow*, there was a denial or invasion of a constitutional right. A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner."

In re Mayfield, supra, this Court, said by Mr. Justice BROWN:

"The point is taken in the brief submitted by the Attorney General that the Supreme Court has no power to consider this question upon an application for a writ of *habeas corpus.* This court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record. *Ex parte Yerger,* 8 Wall. 85; *Ex parte Virginia,* 100 U. S. 339; *Ex parte Carll,* 106 U. S. 521; *Ex parte Yarbrough,* 110 U. S. 651; *Ex parte Bigelow,* 113 U. S. 328; *Re Nielsen,* 131 U. S. 176; *Re Savin,* 131 U. S. 267. *In Re Cuddy,* 131 U. S. 280, it was held directly, that where the petitioner had been committed for a contempt, he was at liberty, upon application for a writ of *habeas corpus,* to allege and prove facts not contradictory to the record, which went to show that the court was without jurisdiction."

In re Bonner, supra, the court used this language:

"From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations its action, to the extent of such excess, is

void. Proceeding within these limitations, its action may be erroneous but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced."

The following cases support our contention that the District Court is without jurisdiction:

In re Heff, 197 U. S. 488; 49 L. ed. 848;
United States v. *Four Bottles Sour-Mash Whisky*, 90 Fed. 720;
Ex parte Crow Dog, 109 U. S. 556;
Bates v. *Clarke*, 95 U. S. 204;
U. S. v. *McBractney*, 104 U. S. 621;
Coyle v. *Smith*, 221 U. S. 559; 55 L. ed. 853;
Oklahoma v. *G., C. & S. F. Ry. Co.*, 220 U. S. 290; 55 L. ed. 469;
United States ex rel. Friedman v. *U. S. Express Co.*, 180 Fed. 1006;
Pleasant Draper v. *United States*, 164 U. S. 240; 41 L. ed. 419;
Oklahoma Enabling Act, 34 St. L. 269.

Respectfully submitted,

JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
Attorneys.

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, petitioner. } No. 11, original.

RETURN TO RULE TO SHOW CAUSE, ETC.

Respondent, S. G. Victor, United States marshal in and for the eastern district of Oklahoma, for his return to the rule of this court heretofore made to show cause why a writ of habeas corpus should not be awarded, as prayed for by petitioner, says:

The petitioner came into his custody and is held by him under the authority of a certain warrant issued out of the United States District Court for the Eastern District of Oklahoma by the clerk thereof upon order of said court, said petitioner being now held by your respondent in his said official capacity as United States marshal and under and by authority vested in him by virtue of the warrant aforesaid.

That the respondent admits the facts, as stated in the petition.

Whereupon, the respondent says that for the reasons above set forth and hereinafter stated in the brief filed on his behalf, no writ of habeas corpus should be awarded by this court.

S. G. VICTOR,
United States Marshal for the Eastern District of Oklahoma.

STATEMENT.

This is a petition for writ of habeas corpus and for writ of certiorari, requiring the United States District Court for the Eastern District of Oklahoma to certify to this court for its review and determination the case of *Ex parte Charley Webb.*

Webb was indicted March 6, 1912, in the United States District Court in and for the Eastern District of Oklahoma, at the city of Vinita, in said State, situated in that part of the State, which was the Indian Territory, for the introduction of intoxicating liquors. Such liquor had been shipped from the city of Joplin, State of Missouri, on petitioner's order and was consigned to him at the said city of Vinita, Oklahoma. Petitioner was arrested, while in the act of receiving the shipment, upon a public street and highway of the said city of Vinita, with the intent of carrying and transporting said shipment along said public highway and through the streets of the said city of Vinita to another point within said city. He was thereupon imprisoned, and subsequently indicted. The city of Vinita is situated upon the original Government town site and is located within that part of the State of Oklahoma which belongs to the Cherokee Nation of Indians.

ARGUMENT.

The Court of Appeals for the Eighth Circuit, in a very thorough and carefully reasoned opinion, has ruled the point in controversy adversely to the peti-

tioner. *United States Express Co.* v. *Friedman*, 191 Fed., 673 (reversing 180 Fed., 1006).

I.

THE EXTINGUISHMENT OF THE INDIAN LAND TITLE TO THE PARTICULAR LOT IN QUESTION DID NOT REMOVE IT FROM THE SPHERE OF THE FEDERAL LIQUOR LAWS, BECAUSE THE VERY TREATIES AND STATUTES WHICH AUTHORIZED THE EXTINGUISHMENT RESERVED THE OPERATION OF THOSE LAWS. THE CASE THUS FALLS WITHIN THE EXCEPTION STATED IN BATES v. CLARK, AND THE SUCCEEDING CASES.

Apparently the Indian title to the particular locus in quo, which was a public highway in the city of Vinita, had been extinguished.

Ordinarily Indian lands cease to be Indian country upon the extinguishment of the Indian title, but in laying down this rule in *Bates* v. *Clark* (95 U. S., 204, 208, 209) the court, as was pointed out in *Dick* v. *United States* (208 U. S., 358), "was careful to add the qualifying words:"

> unless by the treaty by which the Indians parted with the title, or by some act of Congress, a different rule was made applicable to the case.

This principle of exception was based upon the prior case of *United States* v. *43 Gallons of Whiskey* (93 U. S., 188, 193, 195, 197), and it has since been applied in *Dick* v. *United States* (208 U. S., 340). See also *Ex parte Crow Dog* (109 U. S., 556, 561) and *United States* v. *Thomas* (151 U. S., 577).

These decisions control this case because the statutes and treaties which have provided for the ultimate extinguishment of the land titles also provided for the maintenance of the liquor laws.

The title of the Five Civilized Tribes to their lands in the Indian Territory was not the usual mere right of occupancy. These Indians were not the original occupants. The Cherokee, Creek, and Choctaw Nations acquired their lands by grant and patent in fee simple from the United States in consideration of the cession to the United States of all their lands east of the Mississippi. (7 Stat., 210, 233; 11 Stat., 611; 14 Stat., 769; 7 Stat., 237, 286, 366, 417; 11 Stat., 699; 14 Stat., 785; 7 Stat., 156, 195, 311, 414; 9 Stat., 871; 14 Stat., 799.) The Seminole Tribe, by agreement with the Creeks and with their consent, were granted a part of the lands previously conveyed to the Creek Nation. However, although clearly entitled to a patent to these lands, the Seminole Indians have never received one. (7 Stat., 417, 423; 11 Stat., 699; 14 Stat., 755.) Similarly the Cherokees were accorded the Chickasaw district of the Choctaw Nation. (7 Stat., 381; 10 Stat., 1116; 11 Stat., 573, 611; 14 Stat., 769.) These lands were granted for the exclusive occupancy of the Indians, and the United States expressly agreed with the Creeks and Seminoles (11 Stat., 699), the Choctaws (7 Stat., 333), and the Cherokees (7 Stat., 475) that their lands should not be included within any State or Territory without their consent.

This so-called "Indian Territory" was, as its name implies, set apart for the exclusive occupancy of the Indians, and it was unquestionably "Indian country" within the meaning of R. S., sec. 2139, and its subsequent amendments, the last of which is the act of

1897 (29 Stat., 506) concerning the liquor traffic. The applicability up to that time of these statutes (which we assume is unquestioned) was indeed expressly recognized by Congress in section 34 of the act of May 2, 1890 (26 Stat., 81), where it is provided:

> That as to the violations of the provisions of section twenty-one hundred and thirty-nine of said Revised Statutes, the jurisdiction of said court in the Indian Territory shall be concurrent with the jurisdiction exercised in the enforcement of such provisions by the United States courts for the western district of Arkansas and the eastern district of Texas.

And in the numerous acts granting rights of way through the Territory to railroad companies, nearly all of which contained substantially the following provision:

> That the officers, servants and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so engaged, upon such right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with such intercourse laws. (See 24 Stat., 124, sec. 7.)

In 1893 Congress initiated a policy with reference to the Five Civilized Tribes looking to the dissolution of their tribal existence and government, and the allotment of their lands in severalty to the citizens of those nations. (27 Stat., 645.) The so-called Dawes

Commission was authorized and created, which negotiated with the Five Civilized Tribes various agreements designed to effect the purposes and objects of Congress. 32 Stat., 716 (1902, Cherokee); 32 Stat., 641 (1902, Choctaw and Chickasaw); 30 Stat., 567 (1897, Seminole); 31 Stat., 861; 32 Stat., 500 (1901, 1902, Creek). These agreements provided generally for the appraisal of the tribal lands, the enrollment of the citizens of the several tribes and the allotment in severalty of a part of these lands to said citizens. The size of the individual allotments varied for the several nations, but in every case the allottees were required to designate a part of the tract allotted as a homestead, which was to be inalienable, for the life of the allottee in some cases, if less than twenty-one years, in others in perpetuity, and the alienability of the tracts so allotted was variously regulated. These provisions, however, have been the subject of frequent legislation by Congress. (34 Stat., 137; 35 Stat., 312, 444.) Town sites were also provided for and the sale of the town land and also of certain unreserved surplus lands by the Secretary of the Interior to outsiders was authorized. The fundamental act of Congress relative to such town sites and agreeably to which most of the foregoing agreements were framed, is the act of May 31, 1900. (31 Stat., 221.)

In these same statutes Congress explicitly affirmed its intention that, notwithstanding the proposed distribution of lands, the laws concerning the liquor traffic were to continue in force.

The Cherokee agreement provided:

> SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made. (32 Stat., 716.)

The section 13 of the act of June 28, 1898, here excluded from further application covers the matter of oil, coal, asphalt, and other mineral lands.

The section 14, which is stated to be continued in force, relates to town and town government and contains the following paragraph:

> For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory; and the United States court therein shall have jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect: *Provided*, That nothing in this act, or in the laws of the State of Arkansas, shall authorize or permit the sale, or exposure for

> sale, of any intoxicating liquor in said Territory, or the introduction thereof into said Territory; and it shall be the duty of the district attorneys in said Territory and the officers of such municipalities to prosecute all violators of the laws of the United States relating to the introduction of intoxicating liquors into said Territory, or to their sale, or exposure for sale therein: *Provided further*, That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same. (30 Stat., 500.)

The section 27 which also is continued in force, provides as follows:

> That the Secretary of the Interior is authorized to locate one Indian inspector in Indian Territory, who may, under his authority and direction, perform any duties required of the Secretary of the Interior by law, relating to affairs therein. (30 Stat., 504.)

The Choctaw and Chickasaw agreement of 1897, ratified by the Curtis Act of 1898 (30 Stat., 495, 509), under the heading "Town Sites," contained the following provision:

> That no law or ordinance shall be passed by any town which interferes with the enforcement of or is in conflict with the laws of the United States in force in said Territory, and all persons in such towns shall be subject to said laws, and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw Tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality.

The later Choctaw and Chickasaw agreement of 1902 provided (under the title "Sulphur Springs"):

> No person shall occupy any portion of the lands so ceded, or carry on any business thereon, except as provided in said rules, and until otherwise provided by Congress the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded * * *. (32 Stat. L., 641, 656.)

The Seminole agreement provided:

> The United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality.
>
> This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith. (30 Stat., 567–8.)

The first Creek agreement provided:

> SEC. 43. The United States agrees to maintain strict laws in said nation against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind whatsoever.
>
> SEC. 44. This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith. (31 Stat., 861, 872.)

And the second Creek agreement provided:

> This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty, or law in conflict herewith. (32 Stat., 500, 504.)

Furthermore, in 1895, two years after Congress had initiated the policy of dissolving the Five Civilized Tribes and distributing their lands, it nevertheless enacted as follows:

> That any person, whether an Indian or otherwise, who shall, in said Territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said Territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said Territory any of such liquors or drinks, shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than one month nor more than five years. (28 Stat., 697.)

This act plainly prohibits the liquor traffic in the Indian Territory, regardless of any question concerning the technical term "Indian country," and regardless of any question concerning the title to particular

pieces of land and regardless of the race or color of the persons affected.

And still later, when the process of distribution of the lands and extinguishment of Indian title to individual parts of it had proceeded much further, Congress again indicated its understanding that the Federal liquor laws continued nevertheless to apply by repeating the same kind of restriction it had previously imposed upon grants of railroad right of way. This was in section 7 of the act of 1902 (32 Stat., 43, 46) granting a right of way through the Indian Territory to the Enid & Anarkado Railroad Co.:

> That the officers, servants, and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so engaged, upon such right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

Still again, as late as 1907 Congress expressly continued the tribal existence of the Five Civilized Tribes until further action on its part (resolution of March 2, 1907, No. 7, 34 Stat., 822), and this notwithstanding the provisions theretofore made with respect to the dissolution of these tribal relations and the distribution of the lands. This action by Congress prevents the assumption by a State of control based upon the actual conditions, whatever they may be. (*Kansas Indians*, 5 Wall., 737.)

These provisions by Congress accord with the necessities of the condition which were to exist during the transitional state between the old policy of sequestration of the Indians and the proposed ultimate goal of their separation and incorporation into the general population.

As a practical matter, both from the point of view of administrative machinery and from the point of view of actual protection of the Indians and the surrounding whites, it can not be imagined that Congress intended, in the situation which existed there, to withdraw the application of the liquor laws piecemeal, lot by lot, as the land title in each particular acre became finally vested without restrictions in the individual Indian or white purchaser. Under the plan which Congress has been effectuating the particular acres allotted to intermarried whites, to freedmen, and to mixed-blood Indians of a certain degree were to be free of all restrictions. Other particular acres allotted to mixed-blood Indians of certain degrees and to enrolled full-blood Indians were not to be subject to alienation until 1913, unless restrictions should be removed by the Secretary of the Interior. Surplus unallotted lands were to be deemed trust lands. From time to time Congress has made different provisions with reference to the removal of restrictions on particular lands, but the process has been very gradual. Indeed, though the first steps were taken in 1893, there still remain even to-day 2,529,895.54 unallotted and unsold land within the Territory (report of the Commissioner to

the Five Civilized Tribes, 1911, p. 6), and of the acres which are allotted a very large quantity are still under restriction.

In such a situation of the lands and with a population of Indian citizens numbering 101,221, with the country still dominantly Indian, it is hardly reasonable to suppose that Congress should have intended to leave the applicability of the liquor laws dependent upon the individual idiosyncrasies of a vast number of individual acres. The case is very different from *Bates* v. *Clark*, *supra* (95 U. S., 204, and more fully reported on the facts in the State court below, 46 N. W., 510), where the extinguishment of the Indian title was accompanied by the withdrawal of the Indians, and the opening up of the lands to white settlement. (*United States* v. *Payne*, 8 Fed., 888, 895; 22 Ops. A. G., 232.)

Bates v. *Clark* was further distinguished for this very domain by Judge Sanborn, writing for the Circuit Court of Appeals for the Eighth Circuit in 1905, in *Buster* v. *Wright* (135 Fed., 947), on the ground that the Indian title involved was not the mere right of original occupancy, but a title by express grant from the United States.

II.

NEITHER BY ADMITTING OKLAHOMA TO STATEHOOD, NOR BY ANYTHING IN THE ENABLING ACT, DID CONGRESS RENOUNCE ITS CONTROL OVER THE INTERSTATE LIQUOR TRAFFIC INTO THE INDIAN TERRITORY.

As the existence of State government is not in itself inconsistent with the continuation of the Federal power with reference to Indian reservations

and Indian country and adjoining lands affecting Indian relations, and traffic with the Indians, it necessarily follows that the mere creation of a State does not in and of itself oust existing Federal laws on this subject.

> *United States* v. *43 Gallons of Whiskey*, 93 U. S., 188.
> *Dick* v. *United States*, 208 U. S., 340.
> *United States* v. *Holliday*, 70 U. S., 407.
> *Hallowell* v. *United States*, 221 U. S., 317.
> *Ex parte Crow Dog*, 109 U. S., 556, 561.
> *United States* v. *Thomas*, 151 U. S., 577.

The termination of Federal powers implied upon the creation of a State is limited to those powers which, if continued, would abridge the political authority and sovereignty of the State over a subject matter not expressly delegated to Congress, as for instance, the punishment of whites for the murder of whites. (*McBratney* v. *United States*, 104 U. S., 621, 624; *Draper* v. *United States*, 164 U. S., 240.) The same line of distinction was indicated in *Coyle* v. *Oklahoma* (221 U. S., 559), where the court, in holding that Congress had no power to prescribe irrevocably the location of the seat of government for the State of Oklahoma, went on to say, at page 574:

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or

> reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. (*Willamette Bridge Co.* v. *Hatch*, 125 U. S., 1, 9; *Pollard's Lessee* v. *Hagan*, 3 How., 212.)

But whatever might have been the effect of the admission of the State of Oklahoma without any express provision either way with reference to the prohibition of the Federal liquor laws in reference to interstate introduction of liquor into the Indian country, the terms of the enabling act show that Congress intended those laws to continue.

This act reserves (1) the rights of persons or property pertaining to the Indians so long as such rights remain unextinguished, and (2) the authority of the Government of the United States to make laws or regulations respecting such Indians just as if the enabling act had never been passed. It then proceeds to require the State of Oklahoma to bind itself in its constitution to maintain absolute local prohibition for a period of 21 years within the Indian Territory (excepting at certain authorized dispensaries), and to prohibit the introduction of liquor into that Territory from any other part of the State.

The pertinent portions of the act are as follows:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed. (34 Stat., 267.)
>
> SEC. 3. * * * Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation. Any person, individual or corporate, who shall man-

ufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said State into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: *Provided*, That the legislature may provide by law for one agency under the supervision of said State in each incorporated town of not less than two thousand population in the portions of said State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the

compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said State hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which, after his own personal diagnosis, he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other

disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.

Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use. (34 Stat., 269, 270.)

SEC. 21. * * * And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States. (34 Stat., 277–278.)

So far as concerns the first of these paragraphs, it appears necessary for the petitioner to assert that Congress, while expressly reserving its authority to make laws or regulations respecting Indians in the future, intended at the same time to abandon and extinguish *all* its existing exercise of authority, however essential to the complete immediate fulfillment of its own duties.

Nor is there anything in the second of the paragraphs above quoted from the statute to indicate any intention on the part of the Federal Government to repeal the existing laws in reference to the introduction of liquors from other States.

The State is required, first, to prohibit for twenty-one years all sales of liquor within that Territory; and, second, the introduction of liquors and alcohol from other parts of the State into that Territory.

Both these matters were matters in which the Federal and State spheres crossed and would continue to cross during the twenty-one years of the transitional period. Congress was in the midst of the execution of a policy which involved the ultimate dissolution of the tribes, the distribution of their property, and the gradual commingling of their lands and population with the whites until that policy was finally completed, and there was bound to be confusion between the Federal and State authorities. In such a situation Congress may well have hesitated, in view of the *McBratney* and *Draper* cases, *supra*, and *Ward* v. *Racehorse* (163 U. S., 504), and *Matter*

of Heff (197 U. S., 488), to undertake itself to deal with these local phases of the situation, further than to hold its power to compel the State to fulfill the obligations imposed upon it and accepted by it. The possibility of this method of operation was recognized in *Coyle* v. *Oklahoma* (221 U. S., at page 574, *supra*).

But how is it to be inferred that these provisions concerning the *intra*state traffic were intended to carry with them a repeal of the Federal laws against the *inter*state introduction of liquors?

The exclusion is not made by implication, because the two powers are not inconsistent. On the contrary, the implication is the continuance of the Federal power, because it is essential to supplement and make effective the exercise of the duties imposed upon the State.

Among the provisions essential to the complete protection of the Indians against the liquor traffic, only those were assigned by the enabling act to the State which, under the decisions of this court, the State could clearly and naturally exercise.

The State, for instance, was not required to prohibit the introduction of liquor from other States, because that would involve a regulation of interstate commerce. (*Bowman* v. *Railway Co.*, 125 U. S., 465; *Leisy* v. *Hardin*, 135 U. S., 100; *Re Raher*, 140 U. S., 545; *Rhodes* v. *Iowa*, 170 U. S., 412; *Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S., 70; *United States Express Co.* v.

Friedman, 191 Fed., 673.) This court has recently held that the carrier may not lawfully refuse a shipment by a consignee in one State to a consignee within a "dry" local-option district of another, because the laws of the latter State forbid a common carrier to transport beer or any intoxicating liquor to any consignee in any locality within a State where the sale of such liquors has been prohibited by vote of the people under the local-option law of the State. (*Louisville & Nashville R. R.* v. *Cook Brewing Co.*, 223 U. S., 70.)

Nor was the State required to prohibit the *use* of liquors by the consignees (who might be Indians), because the State power does not attach to "use" as distinguished from "disposition." (*Vance* v. *W. A. Vandercook Co.* (No. 1) 170 U. S., 438.) But the State is empowered and required to prohibit the advertising for sale or soliciting the purchase of liquors which have been held to be within the valid police powers of the State under the Wilson Act (*Delamater* v. *South Dakota*, 205 U. S., 93), so that the enabling act has in this particular also required the action by the State at the precise point where its power begins.

Nor was the State required to exercise a police power at the crossing of the boundary line with other States, because the existence of that power has not been determined, having been expressly reserved from decision in *Rhodes* v. *Iowa* (170 U. S., 412, *supra*).

Finally, the only reasonable inference from the care with which Congress provided for the establishment under the State constitution of a State dispensary system for the supply of manufacturers and others whose business or profession imperatively requires alcohol is that Congress conceived that otherwise there would be no source of such supply. The possibility of a free introduction of alcohol from places outside of the State could not have been intended or contemplated.

Incidentally, if the Federal laws no longer prevent the introduction of liquor into the Indian Territory from States other than Oklahoma, then the equality of Oklahoma with its sister States has been impaired, for its inhabitants alone, among all the States, are prevented from conducting that traffic with the Indian Territory.

Nothing in the terms of the enabling act went to repeal the existing laws and treaties, but the whole spirit and plain purpose of the provisions on the subject show that those laws and treaties were intended to continue in force.

III.

The petition should be dismissed.

WINFRED T. DENISON,
Assistant Attorney General.

LOUIS G. BISSELL, *Attorney.*

MAY, 1912.

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No. 11 Orig.

Office Supreme Court, U. S.
FILED
MAY 18 1912
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, PETITIONER.

BRIEF FOR PETITIONER.

LAWRENCE MAXWELL,
JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
JOSEPH S. GRAYDON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, PETITIONER,

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This is an original application for a writ of habeas corpus (in aid of the appellate jurisdiction of the court) to obtain petitioner's release from an arrest by the United States Marshal for the Eastern District of Oklahoma under color of an authority of the United States. The petition shows that petitioner is restrained of his liberty in the county jail of Muskogee County, Oklahoma, by virtue of a capias issued out of the United States District Court, on an indictment in said court charging petitioner and one Otis Tittle with introducing and attempting to introduce from a point without said Indian country (Petition 3) intoxicating liquors into Craig county in the State of Oklahoma within the jurisdiction of said court, the same then and there being and constituting, as alleged, a portion of the Indian country of the United States.

The indictment (Petition 3) is based on the Act of Congress of January 30, 1897, c 109, 29 Stat. 506, which provides:

"That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for each offense thereafter: Provided, however, that the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department."

After the admission of Oklahoma to statehood, it was supposed that the United States courts had no jurisdiction to enforce the provisions of the Act of January 30, 1897, in that part of Oklahoma, which was formerly Indian Territory, and that the act was inapplicable thereto. No attempt was

made to enforce the statute by the federal authorities and it was in fact contended by the state authorities that while the act was not abrogated by the admission of Oklahoma to statehood, the jurisdiction thereunder was transferred from the federal to the state courts. In Oklahoma vs. Gulf, Colorado and Santa Fe Ry. Co., 220 U. S. 290, the bill of the State of Oklahoma to which a demurrer was sustained alleged (p. 5) "that the power to regulate interstate commerce in intoxicating liquors was thereby [by the Enabling Act] surrendered to the State of Oklahoma as to said portions of said state;" and in the brief for the State (p. 33) it was argued that the act of January 30, 1897, became, after statehood, "a law of Oklahoma in force therein by virtue of the second section of the schedule."

But on November 24, 1911, the United States Circuit Court of Appeals for the Eighth Circuit, reversing a judgment of the District Court for the Western District of Arkansas, Ft. Smith Division, decided that the Act of January 30, 1897, on which the indictment is based, is in force and applicable to all that part of Oklahoma which was formerly Indian Territory, on the ground that whatever was Indian Territory is "Indian Country" within the meaning of the act of January 30, 1897. United States Express Co. vs. Friedman, 191 Fed. 673, reversing United States ex rel. vs. United States Express Company, 180 Fed. 1006.

Petitioner's indictment and arrest followed the foregoing decision of the Circuit Court of Appeals for the Eighth Circuit, and in deference thereto his petition for writ of habeas corpus was dismissed in the District Court. The grounds for his application for relief directly to this court are set forth in the brief in support of his amended motion for leave to

file his petition for writ of habeas corpus, which motion was granted by consent of the Solicitor-General, given in view of the public importance of the question involved.

It is alleged in the petition (p. 1-4), and was stipulated at the hearing in the District Court (p. 23), that petitioner is a white man not of Indian blood; that the intoxicating liquors described in the indictment were shipped from the City of Joplin, State of Missouri, by way of the St. Louis and San Francisco Railway Company, a common carrier of interstate shipments, on petitioner's order, consigned to him at the City of Vinita, Oklahoma, and that the same reached said City of Vinita over said railway line in the ordinary course of transportation at the time of the alleged offense set forth in the indictment, to-wit: on January 23, 1912; that in said City of Vinita, in the said County of Craig, State of Oklahoma, and whilst said intoxicating liquors were being delivered by the transportation company to petitioner within the said city, and whilst he was in the act of receiving the same in a public highway of said county and upon a public street of said city, and not upon restricted land, for the purpose of and with the intent of carrying and transporting said shipment along said public highway and through the streets of said City of Vinita to a point within the said City of Vinita, which is situate upon the original government townsite, he was arrested by the United States Marshal; that Craig County constituted a part of the country which was formerly the Cherokee Nation; that all of the lands of the Cherokee Nation have been either allotted to individual

citizens of the Cherokee Tribe under the terms of the Cherokee agreement and the several acts of Congress providing for the allotment of said land, or sold by the United States for the benefit of the citizens of the Cherokee Nation, either as town-sites or otherwise under the acts of Congress.

Petitioner's Claim.

Petitioner contends that he was not subject to indictment in the District Court, and that it was without jurisdiction.

1. Because the Act of January 30, 1897, was repealed as to that part of Oklahoma which was formerly Indian Territory by the Oklahoma Enabling Act of June 16, 1906, c 3335, 34 Stat. 267, in pursuance of the express authority of which the constitution of Oklahoma was adopted and an act passed on March 24, 1908, by the legislature of Oklahoma known as the Billups Law, being sections 4156-4209 inclusive, of the Compiled Laws of Oklahoma of 1909, and also the Act of March 11, 1911, Session Laws of Oklahoma, 1910-1911, p. 154-166.

2. Because the place where the alleged offense occurred was not Indian country within the meaning of the Act of January 30, 1897, at the time of petitioner's arrest.

The Statutes Involved.

Assuming without conceding that prior to statehood the Act of January 30, 1897, was in force in and applicable to all parts of Indian Territory with jurisdiction in the United States courts in said Territory, it becomes necessary to refer to those parts

we contend had the effect of terminating the application of the statute to that part of Oklahoma which was formerly Indian Territory.

The Enabling Act of 1906.

The Enabling Act of June 16, 1906, c 3335, 34 Stat. 267, is entitled:

> "An Act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states, etc."

The pertinent sections are as follows:

> "Sec. 1. That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights or property pertaining to the Indians of said Territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.
>
> Sec. 2. That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed State for at least six months next preceding the elec-

tion, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State; and all persons qualified to vote for said delegates shall be eligible to serve as delegates.

Sec. 3. . . . Said convention shall, and is hereby authorized to form a constitution and State government for said proposed State. . . . And said convention shall provide in said constitution:

Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as The Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above described portions of said State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said State into the portions hereinbefore described, shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: Provided, That the legislature may provide by law for one agency under the supervision

of said State in each incorporated town of not less than two thousand population in the portions of said State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said State hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered,

and the register thereof, together with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquors, except for the treatment of disease which, after his own personal diagnosis he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said state.

Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

Sec. 4 provides for the submission to the people of the constitution to be adopted by the constitutional convention, and the admission of the State on ratification of the constitution by the people.

Sec. 13. That said State, when admitted as aforesaid, shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district, and the said Oklahoma Territory shall constitute said western district. . . . The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.

Sec. 21. All laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States."

On November 16, 1907, by proclamation of the President, Oklahoma was admitted as a State pursuant to the provisions of the Enabling Act, with a constitution accepting irrevocably the terms and conditions of the Enabling Act and containing as section seven thereof the second clause of section three of the Enabling Act quoted at p. supra.

The Separate Constitutional Provision.

At the time when the constitution was submitted to a vote of the people there was submitted a separate article which was adopted and became a part of the constitution, as follows:

"The manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within this State, or any part thereof, is prohibited for a period of twenty-one years from the date of the admission of this State into the Union, and thereafter until the people of the State shall otherwise provide by amendment of this constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, within this State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from one place within this State to another place therein, except the conveyance of a lawful purchase as herein authorized shall be punished, on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty days for each offense: Provided, That the legislature may provide by law for one agency under the supervision of the State in each incorporated town of not less than two thousand population in the State; and if there be no incorporated town of two thousand population in any county in this State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denatured by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall

have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any other purpose than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the State shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing, setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes, except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, together with the affidavits and prescription pertaining thereto, shall be open to inspection by any officer or citizen of the State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for the treatment of disease which, after his own personal diagnosis he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these pro-

visions shall be punished by imprisonment for not less than one year and one day. Upon the admission of this State into the Union these provisions shall be immediately enforceable in the courts of the State."

After the admission of Oklahoma as a state the legislature passed a law, approved March 24, 1908, which was submitted to and approved by the people on referendum vote known as the Billups Law, entitled:

> "An Act to establish a state agency and local agencies for the sale of intoxicating liquors for certain purposes; and providing for referring the same to the people; prohibiting the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors, except as herein provided; providing for the appointment of an attorney, and for the enforcement of the provisions of this act; making an appropriation and declaring an emergency,"

and incorporated into the Compiled Laws of Oklahoma, 1909, as sections 4156 to 4209, inclusive.

The Billups Law.

The first section of Article 1 (Comp. Laws, 1909, Sec. 4156), provided:

> "A State agency is hereby created and established at the capitol of the State. It shall be under the charge, supervision and management of a superintendent, who shall be appointed by and hold office during the pleasure of the Governor. . . . As soon as said superintendent shall have been appointed and qualified, he shall procure a place suitable for the State agency, where shall be received and kept, packed, sealed, labeled, numbered, and shipped out

all liquors purchased or acquired for the use of the State under the provisions of this act. He shall estimate, as nearly as can be, the quantity and kind of intoxicating liquors, and other supplies, necessary for the use of the State agency for a period of not more than three months, and shall invite, and by all reasonable means seek to procure, by advertisement and otherwise, bids from manufacturers and wholesale dealers for furnishing the same. He shall establish a standard of quality to which all purchases made for the State agency shall conform, and upon which all bids shall be based; shall establish suitable rules and regulations for testing and determining the quality of all liquors purchased or acquired for the State agency under the provisions of this act. He shall also, within the five first days of each succeeding month after the first purchase of liquor, as the needs of the State agency may require, make out and keep open for public inspection a list of all liquors and other supplies to be purchased during the ensuing month, stating the kind, grade, quality and quantity, and fixing a date for the purchase thereof. No purchase of any kind of liquor shall be made at one time more than is estimated to be necessary for the use of the State agency for the period of three months."

The fifth section of Article 1 (Comp. Laws, Sec. 4160), provided:

"One agency only for the sale of intoxicating liquors for lawful purposes is hereby established in each incorporated town, within this State, of two thousand population or more, and in each county having no such incorporated town of two thousand population, at some place to be designated by the

superintendent: Provided, however, that one agency for the sale of intoxicating liquors for lawful purposes may be established by the superintendent, subject to the approval of the Governor, in any incorporated town, within this State, of one thousand population or more, or one such agency at any other place in this State where a public necessity exists therefor: Provided, further, the superintendent may prescribe rules and regulations, subject to the provisions hereinafter contained, or that may be hereafter provided by law, under which he shall furnish such liquors to apothecaries, or pharmacists, who are actually and in good faith, engaged in business as such, from the State agency, or from such convenient warehouses as he may in his discretion establish.

The sixth section of Article 1 (Comp. Laws, Sec. 4161), provided:

> "Until otherwise provided by law, a local agent shall be appointed by the Governor, at each local agency, who shall be not less than twenty-one years of age, shall not be addicted to the use of intoxicating liquors as a beverage and shall not have been engaged in the manufacture, or sale of any vinous, spirituous or malt liquors, or any imitation thereof or substitute therefor, within five years next preceding his appointment and who shall not be a practicing physician."

The first section of Article II. (Comp. Laws, Sec. 4162), provided:

> "The superintendent shall pay all special taxes required of liquor dealers by the laws of the United States for the State agency and for all local agencies, and shall prepay all freight or express charges on

shipments from the State agency to the railroad station of the local agent. He shall furnish each local agency, when established, with a stock of liquor from the State agency of various kinds and in packages of assorted sizes, as he may deem necessary, and shall, from time to time, furnish such additional liquors as may be necessary reasonably to maintain the stock on hand at local agencies; Provided, however, that no greater quantity shall be furnished to a local agency, at any one time, than is estimated to be reasonably necessary for three months supply. All liquors furnished to local agents shall remain the property of the State until disposed of by them under the provisions of this act."

The fifth section of Article II. (Comp. Laws, Sec. 4166), provided:

"No sale shall be made by a local agent of any such liquors for any purpose except upon the sworn statement of the applicant in writing, setting forth the name of the person, by whom, and the purpose for which such liquor is to be used, and such sworn statement shall be accompanied by a bona fide prescription signed by a licensed practicing physician; which prescription shall not be filled more than once. For the purpose of taking such sworn statement each local agent is hereby authorized to administer oaths, but shall make no charge therefor. The local agent shall require the purchaser to remove the package from the agency before breaking the seal, and shall not allow the same, or any part thereof, to be used in or about any part of the local agency, or in any room connected therewith. Any purchaser who breaks the seal on any such package of liquor within

the local agency room or in any room connected therewith shall be guilty of a misdemeanor."

The ninth section of Article II. (Comp. Laws, Sec. 4170), provided:

> "The superintendent, may, under regulations to be prescribed by him, provide for furnishing alcohol for scientific purposes to scientific institutions, universities, colleges, or hospitals, authorized to purchase the same, free of tax under the laws of the United States."

The tenth section of Article II. (Comp. Laws, Sec. 4171), provided:

> "The superintendent shall prescribe the necessary rules and regulations for the purchase, handling, and sale of alcohol, for industrial purposes, which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue."

The remaining sections of Article II. provide penalties for unlawful sales, acceptance of bribes, imitation of State label, larceny of liquor from dispensaries, etc.

The first section of Article III, (Comp. Laws, Sec. 4180), provided:

> "It shall be unlawful for any person, individual or corporate, to manufacture, sell, barter, give away, or otherwise furnish, except as in this act provided, any spirituous, vinous, fermented or malt liquors, or any imitation thereof or substitute therefor; or to manufacture, sell, barter, give away, or otherwise furnish any liquors or compounds of any kind or de-

scription whatsoever, whether medicated or not, which contain as much as one-half of one per centum of alcohol, measured by volume, and which is capable of being used as a beverage, except preparations compounded by any licensed pharmacist, the sale of which would not subject him to the payment of the special tax required by the laws of the United States; or to ship or in any way convey such liquor from one place within this State to another place therein except the conveyance of a lawful purchase as herein authorized; or to solicit the purchase or sale of any such liquors, either in person or by sign, circular, letter, card, price-list, advertisement or otherwise, or to distribute, publish or display any advertisement, sign or notice where any such liquor may be manufactured, bartered, sold, given away, or otherwise furnish, or to have the possession of any such liquors with the intention of violating any of the provisions of this act. A violation of any provisions of this section shall be a misdemeanor, and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars and by imprisonment for not less than thirty days, nor more than six months: Provided, however, that the provisions of this act shall not apply to the manufacture and sale of any unfermented cider and wine made from apples, grapes, berries or other fruit grown in this State, and to the use of wine for sacramental purposes in religious bodies."

The following sections of that article provide for jurisdiction in the district courts of the State for violation of the provisions of the act (Comp. Laws, Sec. 4183), for issuance of warrants and seizures of property including liquors where illegal manufacturing, selling, bartering, giving away

or otherwise furnishing such liquors is charged in a warrant (Comp. Laws, Sec. 4184).

The eleventh section of Article III. (Comp. Laws, Sec. 4190), provided:

> "All liquors adjudged forfeited to the State under the provisions of this act, shall, as far as practicable, be utilized by the superintendent for the benefit of the State agency. All bars, fixtures, and property, other than liquors, adjudged forfeited to the State under the provisions of this act, shall be disposed of by the superintendent in such manner that they cannot be again so unlawfully used."

The fourteenth section of Article III. (Comp. Laws, Sec. 4193), provided:

> "All places where liquors of any kind are manufactured, sold, bartered, given away or otherwise furnished in violation of any of the provisions of this act, are hereby declared to be public nuisances and shall be abated in the manner provided by law at the suit of any citizen of the State."

The twentieth section of Article III. (Comp. Laws, Sec. 4199), provided:

> "Any officer, agent or employee of the railroad company, express company or other common carrier, who shall knowingly carry or deliver any liquors, the sale of which is prohibited by this act, to or for any person to be sold, bartered, given away or otherwise furnished in violation of this act shall be guilty of a misdemeanor. Any such officer, agent or employee who shall knowingly deliver any such liquors to any person other than the person to whom it is consigned

and without a written order in each instance of the consignee thereof, shall be guilty of a misdemeanor."

The succeeding sections of that article made it unlawful for a common carrier to carry liquors under false names (Comp. Laws, Sec. 4200): gave a right to damages to persons injured by the illegal sale of liquor (Comp. Laws, Sec. 4201); provided the duties of certain officers in the enforcement of the act (Comp. Laws, Sec. 4203); provided for the appointment of an attorney to assist in enforcing the provisions of the act (Comp. Laws, Sec. 4204); fixed a penalty by fine and imprisonment for violations of the act (Comp. Laws, Sec. 4206); provided that the proceeds of fines collected should be paid one-half to the superintendent for the benefit of the State agency, and the remainder to the road and bridge funds of the county (Comp. Laws, Sec. 4207); appropriated the sum of fifty thousand dollars for carrying into effect the provisions of the act (Comp. Laws, Sec. 4208); declared an emergency and provided for referendum to the people (Comp. Laws, Sec. 4209).
people (Comp. Laws, Sec. 4209).

Oklahoma Act of March 11, 1911.

By an act approved March 11, 1911, being chapter 70 of the Session Laws of Oklahoma, 1910-1911, all of Article I. and Article II. and section 24 of Article III., being section 4203 Comp. Laws 1909, prescribing the duties of certain officers in enforcing the act of 1909, were repealed and it was provided:

"Section 1. The Governor is hereby authorized and empowered, subject to the limitations hereinafter imposed, to prescribe rules and regulations, in accordance with the Consittution and the laws of the United States, for the sale of pure grain alcohol for

medicinal purposes; and for the sale for industrial purposes of alcohol which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of alcohol to any apothecary, druggist, or pharmacist who shall have executed a bond, to the State of Oklohoma, approved by the Governor, in the sum of not less than one thousand dollars ($1,000.00), conditioned that none of said alcohol shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States.

Section 2. Under the power and authority hereby conferred upon the Governor to prescribe such rules and regulations, he may, in his discretion, establish a warehouse or warehouses, and appoint a manager or managers thereof, who shall, in accordance with the rules and regulations prescribed by the Governor, handle all orders for alcohol made in accordance with the laws and Constitution of this State. Provided, however, that such warehouse manager shall bear all expense necessary and incident to said business, and shall fill, promptly, all proper orders for alcohol, at a price, delivered at said warehouse, not to exceed five per centum in excess of the current market price of alcohol laid down at such warehouse; and such warehouse manager shall retain all moneys received for the sale of such alcohol for the purpose of reimbursing himself for the original cost of the alcohol, the

maintenance and operation of the warehouse, and as his compensation for the duties performed and the services rendered in the premises."

The statute amended provisions of Article III. of the Billups Law by increasing penalties for violation of that law, and in other respects not material in this case.

The provisions of the first two articles of the Billups Law were, as already stated, repealed by the Act of March 11, 1911, Session Laws of 1910-11, Chap. 70. In the "Memorandum of Counsel in Support of Amended Motion for Leave to File Petition for Writ of Habeas Corpus" it was inadvertently stated at p. 4 that the Billups Law, relating to state and local agencies, is still in force. But the fact that that law was repealed by the Act of March 11, 1911, is immaterial to the question here under discussion, because the effect of the Enabling Act on the Act of 1897 must be determined as of the time the Enabling Act was adopted by Congress, and in view of the authority which it gave the state legislature to permit the sale in and introduction of liquors into the territory, and not in view of what the legislature has actually done under the authority so conferred. In addition, the provisions of the Act of March 11, 1911, repealing the provisions of the Billups Law contemplate that the Governor shall prescribe rules and regulations respecting the sale of liquors in this territory and their introduction therein, and to that extent undertake to authorize violations of the provisions of the Act of 1897 just as much as did the repealed sections of the Billups Law.

The police provisions of the Act of January 30, 1897, do not apply to Oklahoma since its admission into the Union. Their continued existence is inconsistent with the Enabling Act and the State Constitution and laws expressly authorized thereby.

By the Enabling Act of June 16, 1906, Oklahoma was "admitted into the Union on an equal footing with the original states." As said by Mr. Justice White for the court in Draper vs. United States, 164 U. S. 240, 243, referring to the Colorado Enabling Act, such provision "necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. The Cherokee Tobacco, 11 Wall. 616." He says further, at p. 244: "As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated."

Jurisdiction in the United States courts in Oklahoma and authority in the federal officials there, to arrest and imprison citizens of that state for offenses over which such courts and officials lack jurisdiction and authority in other states constitutes an inequality in statehood not to be implied, but to be specially expressed by Congress at the time of admission in connection with a subject over which it has jurisdiction. Commerce and trade with Indians and control over the persons of Indians, while upon a reservation, and of white men who deal with them, is a subject of this kind, and cases in this court consider especially the provisions of acts of Congress governing the traffic with Indians in intoxicating liquors.

The Act of Congress of January 30, 1897, is a police regulation of a stringent kind. Mr. Justice Brewer, delivering the opinion of the court in Matter of Heff, 197 U. S. 488, said, at p. 505, in reference to the statute:

> "The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. . . . It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the states jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation, and not divided between the two."

The statute of 1897 forbids absolutely and under all circumstances the sale of "malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label or brand, which produces intoxication, to any Indian, etc." and said act provides a "punishment by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter;" and the jurisdiction of such offenses is exclusively in the United States courts.

The second paragraph of Section 3 of the Enabling Act provides that the sale of intoxicating liquors of any kind in that part of Oklahoma which was formerly Indian Territory,

contrary to the provisions of this section, shall be punished "by a fine not less than fifty dollars and by imprisonment not less than thirty days for each offense," and that "upon the admission of said state into the Union these provisions shall be immediately enforceable in the courts of said state."

We therefore have a statute of the United States punishing the specific offense of selling liquor to an Indian, fixing a certain penalty to be enforced in the courts of the United States, followed by an Enabling Act creating a new sovereign state, prohibiting the sale of liquors to anybody, fixing a lesser penalty for the offense of selling, and placing the jurisdiction in the state courts. The two acts reveal an essential inconsistency which makes it impossible for both to remain in force, unless there can be a divided sovereignty. Every sale which would constitute a violation of the act of 1897 in this territory, would also constitute a violation of the Enabling Act, punishable by the express provisions of that act in the state courts.

The legislature did not undertake to pass the law for the establishment of state and local agencies for the sale of liquors for certain purposes, which it was authorized to pass by the proviso contained in the second paragraph of section 3 of the Enabling Act until March 24, 1908. As the state was admitted by proclamation on November 16, 1907, it cannot be disputed that in the interval, the state courts only had jurisdiction of the offense of selling liquors in that part of the state which had formerly been Indian Territory, regardless of the race of the purchaser.

But petitioner here is charged not with selling liquor to an Indian but with introducing and attempting to introduce

it into Indian country, and assuming that it would be possible for the Enabling Act to abrogate that part of the Act of 1897, which makes it an offense to sell liquor to an Indian in the Indian country and leave in force that part of the act which makes it an offense to introduce liquor into the Indian country, it is necessary to consider the effect of the Enabling Act on that part of the Act of 1897 which prohibits introduction. The second paragraph of section three of the Enabling Act contemplated a constitutional provision and subsequent state legislation which should authorize the sale of liquor for certain purposes in that part of the new state which had formerly been Indian Territory. But as the "manufacture" of liquors in that part of the state was absolutely prohibited for a period of twenty-one years by the Enabling Act in that part of the state which had formerly been Indian Territory, and as the power to sell liquors which the proviso conferred could not be exercised without the "introduction" of liquors into that section which was formerly Indian Territory, the Enabling Act necessarily contemplated the abrogation of the Act of 1897 forbidding introduction, if not immediately on the admission of the new state, at any rate as soon as the legislature should establish agencies for the sale of liquors in the territory, under the authority contained in the proviso. This was done by the enactment of the Billups Law (supra p.).

It was not contemplated that the local agencies to be established in this territory should have the power to sell liquors manufactured in that territory, because none could be manufactured there. Nor was it contemplated that the liquors introduced therein should be introduced only from

points in the new state without such territory, because no such restriction appears in the proviso of section 3 of the Enabling Act. As, also, in fact the constitutional convention by separate provision adopted a section (p. supra) which prohibited the manufacture of liquors anywhere in the state for a period of twenty-one years, the liquors which the state and local agencies were to sell, must necessarily be introduced from points outside the state. This being the case such introduction could not continue to be an offense punishable in the United States courts under the Act of 1897.

It cannot be disputed that the Enabling Act authorized the doing of acts which the statute of 1897 forbade; that for other acts forbidden by the statute of 1897 and not authorized by the Enabling Act, the penalties were changed; that the state courts were given jurisdiction to punish acts in violation of the provisions of the Enabling Act which were also violations of the statute of 1897 and punishable in the United States courts.

The Enabling Act indicates no intention to continue in force as to Oklahoma, jurisdiction by the United States courts over her citizens for offenses of a police nature, in regard to which the United States courts have not jurisdiction in the "original states." The expression contained in section 1 of the Enabling Act; "That nothing contained in said constitution shall be construed . . . to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, etc." excludes an inference of the continued existence of the United States police regulations respecting such Indians (who, by section

2 are made citizens of the state), while at the same time perhaps indicating an intention by Congress to retain the power to enact in future police regulation of the character of the Act of 1897, for the protection of Indians in Oklahoma, if necessity demands.

As the Enabling Act deals with and affects the same subjects and persons as the Act of 1897, it must repeal it entirely, unless it can be contended that it repeals it only pro tanto by way of amendment. But the objection to such construction of the two statutes is that its acceptance results in a statute (made up by grafting the provisions of the Enabling Act on to that part of the Act of 1897 which remains unrepealed), so incongruous and indefinite in purpose and effect that it would be impossible to enforce it. If such construction could be adopted we should have in the territory, immediately on the admission of the state and prior to the taking effect of the Billups Law, the following situation: the sale of liquor to Indians in the territory punishable in the United States courts under the Act of 1897, and the sale of liquor to any person, including Indians, punishable under the provisions of the Enabling Act in the state courts with a lesser penalty. After the passage of the Billups Law the sale of liquors by the local agents in the territory for the limited purposes set forth in the Enabling Act would be authorized even to Indians, but the sale by other persons or the sale by local agents for purposes not permitted would be punishable under the Act of 1897 where the purchaser was an Indian, and apparently also punishable under the provisions of the Billups Law whether he was an Indian or not.

As to the offense of introducing liquor into the territory, it would have to be admitted that introduction for supplying the needs of local agencies was permitted, and that the provisions of the Act of 1897 were repealed to that extent, leaving the Act of 1897 in force against introduction for other purposes. But if that was the purpose of the Enabling Act it entirely fails to express it, because it does not provide who may so introduce liquors into the territory and who may not, for the purpose of supplying the local agencies, and the law would be so framed that neither court nor layman could ascertain by reading it by whom and under what circumstances such introduction was innocent or criminal.

In United States vs. Brewer, 139 U. S. 278, 288, the court said:

> "Laws which create crimes ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid. U. S. vs. Sharp, Pet. C. C. 118."

In the Enterprise, 8 Fed. Cas. 4449, Mr. Justice Livingston said:

> "Where there is such ambiguity in the penal statute as to leave reasonable doubts as to its meaning, it is the duty of the court not to inflict the penalty."

In section 41 of Bishop on Statutory Crimes, cited by Mr. Justice Brewer in Chicago & N. W. Ry. Co. vs. Dey, 35 Fed. 866, it is said:

> "If the legislature enacts an impossibility, no court will undertake to carry it into effect. Of this sort is a case of . . . . Ambiguity. When the

> statute terms are of such uncertain meaning, or so confused that the courts cannot discern with reasonable certainty what is intended, they will pronounce the enactment void."

In Sutherland on Statutory Construction, 1st Ed. page 438-9, it is said:

> "The penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to its justice and humanity that it be expressed in language which they can easily comprehend; that it be held obligatory only in the sense in which all can and will understand it. And this consideration presses with increasing weight according to the severity of the penalty. Hence every provision affecting every element of a criminal offense involving life or liberty is subject to the strictest interpretation . . . It is the legislature, not the court, which is to define a crime and ordain its punishment."

The necessity of certainty in the meaning of a statute is adverted to by Lord Aukland in his Principles of Penal Law, at pages 312-314 (1771), as follows:

> "It is further essential to political freedom, that the laws be clearly obvious to common understanding, and fully notified to the people. . . . When the people first learn the law by fatal experience, they feel as if the Judge was in effect Legislator; and as if life and liberty were subjected to arbitrary control. . . . The same will be the consequences, where the law is imperfectly and indefinitely expressed. The style therefore should be clear, and as concise as is consistent with clearness; general terms

also should be particularly avoided, as liable to become the instruments of oppression."

We submit that a construction of the Enabling Act by which it is held not to repeal but to supplement by amendment only the Act of 1897 will result in a statute containing the defects condemned by these authorities, and that therefore no such construction should be adopted.

The question whether the Act of January 30, 1897, remained in force in that part of Oklahoma which was formerly Indian Territory after the admission of the State is one of statutory construction, the presumption being that it did not, because its continued existence implies inequality of statehood.

In United States vs. McBratney, 104 U. S. 621, it was held that the Circuit Court of the United States for the District of Colorado had no jurisdiction of an indictment against a white man for the murder of a white man within the Ute Reservation in the State of Colorado.

Mr. Justice Gray said at p. 621:

> "The circuit courts of the United States have jurisdiction of the crime of murder committed in any 'place or district of country within the exclusive jurisdiction of the United States;' and except where special provision is made, 'the general laws of the United States as to the puishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.' Rev. Stat. Sec. 629, cl. 20 Sec. 2145, Sec. 5339, cl. 1."

At p. 623 he said:

"By the first section of the Act of Congress of February 28, 1861, c 59, to provide a temporary government for the Territory of Colorado, all territory which, by treaty with any Indian Tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any State or Territory, was excepted out of the boundaries and constituted no part of the Territory of Colorado; and by the sixteenth section, 'the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Colorado as elsewhere within the United States.' 12 Stat. 172, 176. If this provision of the first section had remained in force after Colorado became a State, this indictment might doubtless have been maintained in the Circuit Court of the United States. United States vs. Rogers, 4 How. 567; Bates vs. Clark 95 U.S. 204; United States vs. Ward, 1 Wool. 17, 21.

But the Act of Congress of March 3, 1875, c. 139, for the admission of Colorado into the Union, authorizes the inhabitants of the Territory 'to form for themselves out of said Territory a State government, with the name of the State of Colorado; which State, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever;' and the act contains no exception of the Ute Reservation, or of jurisdiction over it. 18 Stat. pt. 3, p. 474. The provision of section one of the subsequent act of June 26, 1876, c. 147 (19 Stat. 61), that upon the admission of the State of Colorado into the Union 'the laws of the United States, not locally inapplicable, shall have the same

force and effect within the State as elsewhere within the United States," does not create any such exception. Such a provision has a less extensive effect within the limits of one of the States of the Union than in one of the Territories of which the United States have sole and exclusive jurisdiction.

The act of March 3, 1875, necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. The Cherokee Tobacco, 11 Wall. 616. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. The Kansas Indians, 5 Wall. 737; United States vs. Ward, supra. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatsoever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States."

In Draper vs. United States, 164 U. S. 240, plaintiff was indicted in the Circuit Court of the United States for the District of Montana for the crime of murder alleged to have been committed on the Crow Reservation. He contended that the United States court had no jurisdiction and that such crime was exclusively cognizable by the state court. Neither the accused nor the deceased were Indians, and this

being true the court, speaking through Mr. Justice White, at p. 241, said that "if as a matter of law, the reservation was not within the sole and exclusive jurisdiction of the United States as the indictment fails to charge that the crime was committed by an Indian, it necessarily follows that if the court had jurisdiction only to punish such a crime the want of such jurisdiction appears upon the face of the record." At p. 242 it is said:

> "The question then is, has the State of Montana jurisdiction over offenses committed within its geographical boundaries by persons not Indians or against Indians, or did the Enabling Act deprive the courts of the State of such jurisdiction of all offenses committed on the Crow Indian Reservation, thereby divesting the state pro tanto of equal authority and jurisdiction over its citizens, usually enjoyed by the other states of the Union."

Referring to United States vs. McBratney, 104 U. S. 621, the court said at p. 243, that that case was "decisive of the question now before us, unless the Enabling Act of the State of Montana contained provisions taking that State out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the state by virtue of its admission into the Union."

It was held that the provision in the Montana Enabling Act that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States," did not have the effect to "deprive that state of power to punish for crime committed on a reservation of Indian lands by other than Indians or against Indians."

In Matter of Heff, 197 U. S. 488, petitioner was convicted on October 15, 1904, in the District Court of the United States for the District of Kansas for the unlawful sale of liquor to John Butler, a Kickapoo Indian, and a ward of the Government under the charge of an Indian superintendent. The indictment was based on the Act of Congress of January 30, 1897. The United States Circuit Court of Appeals for the Eighth Circuit having decided the question involved adversely to his contention in Farrell vs. U. S., 110 Fed. 942 (Sept. 30, 1901), he presented his petition for a writ of habeas corpus to this court. His release was ordered on the ground that the Act of January 30, 1897, was unconstitutional as applied to sales of liquor to an Indian who had received an allotment under the provisions of the Act of Congress of February 8, 1887, because it was provided in that act that every Indian to whom allotment had been made, should be subject to the laws, both civil and criminal, of the state in which they might reside. It was further held that John Butler having received his allotment of land in severalty, and his patent therefor, under the Act of Congress, was no longer a ward of the Government but a citizen of the United States and of the State of Kansas, and subject to the laws of Kansas. At p. 499 it is said:

> "It is for Congress to determine when and how the relationship of guardianship shall be abandoned . . . . It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

It was held that as Butler was a citizen of the United States and of the State of Kansas at the time the defendant sold him the liquor, defendant's conviction could not be sustained under the Act of January 30, 1897, as the regulation of the sale of intoxicating liquors to such Indians had passed within the domain of the police power of the state. The act of 1897 was said to be "a police regulation" and it was stated, at p. 505:

> "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that State would be an invasion of the states jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation, and not divided between the two."

Mr. Justice Brewer referred to The Kansas Indians, 5 Wall. 737, deciding that there could be no divided authority over the property of an Indian. It was pointed out that the same act, such as a sale of liquor, might be a violation of both a state and a federal law, for instance, a state and a federal revenue law; but this is true "only when those laws occupy different planes." In police matters the two laws occupy the same plane and cannot co-exist.

It was then considered whether under its power to regulate commerce with the Indian Tribes, Congress might not

punish the sale of liquor to an Indian although the Indian had become a citizen of a state, but it was held that in this case Congress had released itself from the obligation of guardianship in so far as the police power was concerned, even though it had provided that the Indian's title to property should not be alienated for twenty-five years. It was said, p. 509, "these are mere property rights and do not affect the civil or political status of the allottees." The basis of the decision is stated to be as follows:

> "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.
>
> The district Court of Kansas did not have jurisdiction of the offense charged, and therefore the petitioner is entitled to his discharge from imprisonment."

United States vs. Celestine, 215 U. S. 278, was a writ of error to correct a judgment of the circuit court of the United States for the Western District of Washington, convicting Celestine of the crime of murder within the limits

of an Indian reservation within the boundaries of the State of Washington and in said Western District. The defendant pleaded that at the time of the offense he was a citizen of the United States and that he was holder of an allotment to him upon the Indian reservation and was subject to the laws of the Territory and State of Washington. The case was said to present the question "whether jurisdiction of the crime of murder committed by an Indian allottee upon allotted land of an Indian reservation in a state is vested in the state or in the federal courts." In the opinion by Mr. Justice Brewer, it is shown that under the Act of March 3, 1885, that certain crimes of Indians, including murder, were placed within the exclusive jurisdiction of the United States courts. Although defendant had a patent on an Indian reservation the patented land had not been excluded from the reservation by act of Congress. It also appeared that at the time the crime was committed the reservation was occupied by Indians under charge of an Indian agent. Some of the lands were allotted and others remained unallotted. It was pointed out that the person to whom defendant sold liquor in the Heff case had received a patent under the general allottment act of 1887 and that it did not appear that the sale was made on any reservation, while the murder in this case was committed within the limits of the reservation, and defendant's patent was issued under another statute. It was held that although Celestine was made a citizen of the United States and of the State, it did not follow that the United States lost jurisdiction over him for offenses committed within the limits of the reservation.

The court said, at p. 290:

"It may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation: at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependant race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

In U. S. vs. Sutton, 215 U. S. 291, it was held that:

"under the Washington Enabling Act, jurisdiction and control over Indian lands remains in the United States, and Congress has power to prohibit and punish the introduction of liquor therein" (Syl).

Defendants were indicted under the Act of January 30, 1897, for introducing liquor upon an allotment of land held in trust by the United States for the allottee and inalienable by him within the boundaries of the Yakima Indian Reservation. It was contended that the offense was one within the police powers of the State. But by the Washington Enabling Act the State disclaimed title to and jurisdiction over all lands therein owned or held by Indians, and jurisdiction over the same remained in Congress. The result of the decision is that as Congress reserved the jurisdiction over the Indian Lands it had the power subsequently to pass the act of 1897 which was a statute against introducing liquor into such lands and enforce it.

Tiger vs. Western Investment Co. 221 U. S. 286, and Heckman vs. United States, 222 U. S. , decided this term, involved the enforcement of provisions restricting the alienation of allotted lands in the Five Civilized Tribes in Oklahoma. The principal question considered in both of these cases was the extent of the Government's guardianship over the property (not the person) of the Indians of the five civilized tribes.

Guardianship is a trust dual in its nature, involving two distinct and separable functions. The one is the control of the person of the ward, the other the management of his estate.

In the Matter of Heff the court in deciding that Congress had relinquished its guardianship over the person of the Indians involved in that case by subjecting them to the laws both civil and criminal of the State in which they lived, and to that extent had abrogated the Act of January 30, 1897, recognized that the abandonment of that aspect of its guardianship over the Indian was not inconsistent with the reservation of power to enforce restrictions on alienation of lands granted to such Indians.

This was the principle which governed the decision of Judge Rogers in United States, ex rel Friedman, vs. United States Express Company, 180 Fed. 1006.

In United States vs. Hall, 171 Fed. 214, District Judge Quarles said, at p. 218:

> "Guardianship is a trust which is dual in its nature, involving two distinct and separable functions. One is the control of the person of the ward, the other the management of his estate. We have

seen that it has been settled that the Government may, at any time, terminate this relation of guardianship. It follows, therefore, it may at its pleasure emancipate the Indian from personal control, and still retain the other function of managing and conserving his property. That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language employed in the act of 1887 that no argument could make it plainer. The purpose of the government to protect the title of allotted land has been declared with equal distinctness. To control the habits and restrain the passions of a people is the peculiar province of the police power."

See also Gearalds vs. Johnson, 183 Fed. 611.

Hallowell vs. United States, 221 U. S. 317, was a certificate from the Circuit Court of Appeals for the Eighth Circuit to determine whether one Hallowell was guilty of the charge of introducing whiskey into the Indian country in violation of the Act of January 30, 1897.

Hallowell was an Omaha Indian and an allottee of land granted him on the Omaha Indian Reservation in Thurston County, Nebraska, under the Act of Congress of August 7, 1882. The first patent was issued to him in 1884 and the twenty-five year limitation had not expired at the time of the alleged offense, the fee being held by the United States. Hallowell procured whiskey outside this reservation and took it to his home within the reservation and upon the allottment. The Omaha Indians exercised the right of citizenship in the county and state governments, and were also citizens of the United States. Sec. 7 of the Act of 1882 provided that upon the completion of allottments and the

patenting of the lands to the allottees, each and every member of said tribe should have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska, and such Indians were further declared to be citizens of the United States, entitled to all the rights, privileges and immunities thereof. The court held that the act of Hallowell was a violation of the statute of January 30, 1897, as he introduced liquor upon an Indian allotment, while the title to the same was still held in trust by the Government and that the statute therefore was applicable and enforcible by the United States "within its own territory and in the interest of the Indians."

In the Oklahoma Enabling Act Congress reserves by force of section one the right "to make any law or regulation respecting such Indians, their lands, property, or other rights," but does not undertake to keep in force police regulations affecting Indians, theretofore enacted.

By the third section the people of the state "disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States." While the people of the state disclaim title to Indian lands, there is no reservation by the United States of Jurisdiction over such lands or country, in a section where one should expect to find a reservation expressed, if one were intended. And there is no reservation at all of jurisdiction over the Indian as a person.

The place where the alleged offense was committed was not "Indian country" within the meaning of the Act of January 30, 1897.

Ex Parte Crow Dog, 109 U. S. 556.
United States vs. LeBris, 121 U. S. 278.
United States vs. Four Bottles Sour Mash Whiskey, 90 Fed. 720.
United States vs. Knowlton, 3 Dak. 58, 13 N. W. 573.
Forty-three Cases Cognac Brandy, etc., 14 Fed. 539.
United States vs. Martin, 14 Fed. 817.

In Ex Parte Crow Dog, supra, the court said (109 U. S. at p. 560) in defining Indian Country:

> "The first section of the Indian Intercourse Act of June 30th, 1834, 4 Stat. 729, defines the Indian country as follows:
>
> 'That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country.'
>
> Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new states, and by the organization of territorial governments; and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, have, nevertheless, omitted all definition of what now must be taken to be 'the Indian

country.' Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. . . . .

In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, but saving even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. United States vs. McBratney, 104 U. S. 621.

This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important pro-

visions of existing legislation for the government of Indian country."

In United States vs. LeBris, 121 U. S. 278, Chief Justice Waite, delivering the opinion of the court, said, p. 279:

"This is an information against Baptiste LeBris under Sec. 2139 of the Revised Statutes, for introducing spirituous liquors, 'from some place and territory outside of the Indian country, into the Indian country, to-wit, into that part thereof lying and being in the county of Polk in said district, and being and known as the Red Lake and Pembina Indian Reservation.' LeBris demurred to the information, and the judges holding the circuit court have certified to us, that, upon the hearings of the issues of law thus presented, their opinions were opposed upon the following questions:

1. Is the reservation of the Red Lake and Pembina Indians in Polk County, Minnesota, Indian country, within the meaning of Sec. 2139 of the Revised Statutes of the United States?

2. What is meant by Indian country in the heading of c. 4, tit. 28 of the Revised Statutes and in the sections in that chapter which define crimes committed in Indian country?

3. Does Sec. 5596 of the Revised Statutes repeal and abolish the definition of Indian country found in Sec. 1 of the trade and intercourse act of June 30, 1834, 4 Stat. 729?

4. If it does, are all the provisions of c. 4, tit. 28, for punishment of crime in Indian country nugatory?

5. If the provisions of c. 4, tit. 28 of the Revised

Statutes are not rendered nugatory by Sec. 5596, to what locality do they apply?

The important inquiry is, whether the Red Lake and Pembina Indian Reservation has been 'Indian country' within the meaning of Sec. 2139 since the Revised Statutes went into effect. That section is a re-enactment in part of Sec. 20 of the act of June 30, 1834, c. 161, 4 Stat. 729, 732, as amended by the act of March 15, 1864, c. 33, 13 Stat. 29, and it was decided by this court in United States vs. 43 Gallons Whiskey, 93 U. S. 188, and 108 U. S. 491, that this reservation was 'Indian country' before the revision of the statutes. At that time Sec. 1 of the act of June 30, 1834, supra, was in force, which defined the Indian country as follows:

'That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.'

This section was not re-enacted in the Revised Statutes, though other parts of the statute were. Consequently the section was repealed by Sec. 5596 of the revision, but still we held in Ex parte Crow Dog, 109 U. S. 556, 561, that it might be referred to for the purpose of determining what was meant by the term 'Indian Country,' when found in sections of the Revised Statutes which were re-enactments of other sections of this statute. That decision was made since this case was heard below, and upon

its authority we answer the first question certified in the affirmative. The repeal of this section does not of itself change the meaning of the term it defines when found elsewhere in the original connection. The re-enacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested."

In United States vs. Four Bottles Sour Mash Whiskey, 90 Fed. 720, the District Court for the Eastern District of Washington held, syllabus 2:

> "The provisions of the act of July 1, 1898 (St. 2d session, 55th Cong. p. 593, c. 545), authorizing the entry of mineral lands in the Colville Indian reservation, in the State of Washington, under the laws of the United States relating to the entry of mineral lands, necessarily gave prospectors and miners the right to explore the reservation for minerals, and authorized citizens who make discovery of valuable minerals therein to locate claims and work them as required to obtain title under the mineral land laws. The effect of such a valid location is to segregate the claim from the reservation, and extinguish the Indian title thereto, which is merely possessory, so that the land embraced in such location, ceases to be Indian country, within the meaning of Revised Statutes, Sec. 2139, 2140, and 29 Stat. p. 506, c. 109, prohibiting the introduction of liquors into Indian country, and becomes subject to the jurisdiction of the state."

In United States vs. Knowlton, 3 Dak. 58, the Supreme Court of Dakota defines Indian Country as follows:

> "Without entering into a more elaborate definition, it is sufficient for the purposes of this case to

> say that the term 'Indian Country' includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of Indians, and which are not included within the jurisdiction of any state or territorial government."

The Act of January 30, 1897, enlarged the prior definition of Indian Country by including; first, the allotted lands to which Indians have received the legal title while the same are inalienable except with the approval of the United States; second, allotted lands the title to which is held in trust by the government. The Indian title in the Cherokee nation having been wholly extinguished, if there is any Indian Country in that part of Oklahoma which was formerly the Cherokee nation it can only be restricted land, for it is agreed that all the public domain has been either allotted to citizens of the tribe or sold as town sites or otherwise for the benefit of the members of the tribe. The petitioner alleges and it is agreed by the United States that the entire government town-site of Vinita has been sold and that all of the other government town-sites of the Cherokee nation have been conveyed, so that there is no Indian title whatsoever in Vinita, or any other city or town in the Cherokee nation. Where there is no Indian title, no inalienable land and no allotted land held in trust by the government, there can be no Indian Country even by the broadest definition ever given to the term.

The Circuit Court of Appeals for the Eighth Circuit in the case of United States Express Co. vs. Friedman, 191 Fed. 673, makes the following points; first, the tribal existence

of the Five Civilized Tribes was continued by the joint resolution of Congress of March 2, 1906, 34 Stat. 822, and by the Act of April 26, 1906, 34 Stat. 148; second, that there are 18 government Indian agents in the Indian Territory and a large force of clerks; third, that on November 1, 1911, as shown by the reports of the office of Indian affairs there were over two million acres of unallotted lands in the Indian Territory.

To determine the effect to be given the acts of Congress continuing the tribal relations the various acts of Congress looking to the breaking up of the tribes and to the organization of the new state and to the making of the Indians useful citizens of the new state must be considered. All of these indicate a progressive policy by which it was intended to dispose of the entire Indian question in the Five Civilized Tribes as soon as the same might be done in a way consistent with the well being of the Indians themselves and the welfare of the new state. In the course of this progress made under these various acts difficulties were encountered which made it impossible to dispose of the various properties of the tribes within the periods fixed by Congress. In order that there might be a form of tribal existence in each tribe through which distribution might be made, tribal existence was continued; but this existence is in mere form only. The tribes have no power; they cannot act; their legislatures cannot enact laws. This situation is very similar to that of a corporation already dissolved but with some assets left to be distributed to the stockholders. In such a situation by a fiction of law the courts will treat the corporation as in existence in mere form in order to effect distribution of the remaining

assets. As to the agents and clerks: They have no power or jurisdiction whatever except over the properties of the tribe which have not been disposed of and certain duties with respect to restricted lands. They have no function whatever to perform in an Oklahoma city such as Vinita. They are in no manner connected with the police regulations of such a city. They have no control over the Indians personally as to the allotted land, and there is no unallotted land, as the agreed statement shows, in the Cherokee nation, a tract of country larger than some of our states. That nation, like the other Five Civilized Tribes is now occupied largely by white people who live upon alienable lands. While it is true that certain parts of the Cherokee lands as well as certain parts of the lands of all of the Five Tribes are inalienable, yet it does not follow that the entire Eastern half of the State should be patrolled by deputy United States marshals. For illustration: The City of Muskogee in the Creek nation has a population of more than 30,000 and ordinarily it is not easy to discover an Indian within the city, even when looking for one. If the government prevails in this case, this city, instead of being subject to its own police control, will be under the control of the government, a condition which the people of that country believed they were escaping upon the admission of the state.

Petitioner Is Entitled to Habeas Corpus.

This application in both of its aspects presents the question: Does the United States District Court for the Eastern District of Oklahoma have jurisdiction to arrest the petitioner and condemn him upon the admitted facts? It is well settled by the decisions of this court that habeas corpus is an

appropriate writ when an inferior United States Court is proceeding without jurisdiction. Petitioner concedes that the facts alleged in the indictment are true. Having admitted the facts at the hearing upon the writ in the District Court, the writ was discharged solely because of the decision of the Circuit Court of Appeals in the Friedman Case. The District Court had held at various times theretofore that intoxicating liquors might be introduced by interstate shipment into that part of the State formerly the Indian Territory except upon unallotted and restricted lands and had not passed upon the question whether liquors could be introduced upon restricted and unallotted lands. The trial below must result in a conviction. Petitioner cannot obtain relief in the Circuit Court of Appeals for the Eighth Circuit, because that court has decided the question involved against petitioner's contention. This court cannot reach the petitioner's case upon appeal.

The unusual circumstances of the case justify the application in this court. The question of jurisdiction presented is an important public question of great interest to all the people in the State of Oklahoma, particularly in that part of the State formerly Indian Territory, and is one of special interest to the State and government officers in Oklahoma, and is of interest to Congress because a large appropriation must be made to enforce the Act of 1897, if same is to be enforced by the government.

From the admission of Oklahoma until the Friedman decision it was assumed by all parties concerned that the Act of January 30, 1897, was repealed as to Oklahoma, and that the State only had authority to provide and enforce police

regulations relating to intoxicating liquors; but following the Friedman case the government has commenced to enforce the said act of January 30, 1897. On the other hand the various acts of the legislature of Oklahoma attempt to cover the entire field within which police regulations relating to intoxicating liquors may operate. The United States now undertakes to operate within part of the same field. We therefore have in this situation two sovereigns attempting to operate upon the same matter, upon the same plane, at the same time. There cannot be a divided sovereignty in such a matter, and it is therefore clear when the various acts of the Oklahoma legislature are considered that confusion and conflict of authority must ensue unless the question here presented is speedily determined. It is clear that the legislature of Oklahoma does not concede the right of the United States to impose or enforce police regulations in that State unless perhaps upon restricted and unallotted land, and as to its position with respect to restricted and unallotted land there is doubt. The government does not hold any of the Indian Territory lands in trust, and therefore, if the Act of 1897, operates at all in that part of the State formerly Indian Territory, it must be upon restricted and unallotted land.

The following cases support our contention that the writ should issue:

Matter of Heff, 197 U. S. 488; 49 L. Ed. 848.
Ex Parte Nielson, 131 U. S. 176; 33 L. Ed. 118.
In re Mayfield, 141 U. S. 107.
In re John Bonner, 151 U. S. 242; 38 L. Ed. 149.
Ex Parte Albert Siebold, 10 Otto 371; 25 L. Ed. 717.
In the Matter of Schneider, 148 U. S. 162; 37 L. Ed. 406.

U. S. Supreme Court Practice by May, p. 440.

In the case of Ex Parte Nielson, supra, this court said, at p. 184:

> "The distinction between the case of a mere error in law, and of one in which the judgment is void, is pointed out in Ex Parte Siebold, 100 U. S. 371, 375 (25; 717), and is illustrated by the case of Ex Parte Parks as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner."

In re Mayfield, supra, this court, said by Mr. Justice Brown, at p. 116:

> "The point is taken in the brief submitted by the Attorney-General that the Supreme Court has no power to consider this question upon an application for a writ of habeas corpus. This court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, but not inconsistent with, the record. Ex parte Yerger, 8 Wall, 85; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521; Ex parte Yarbrough, 110 U. S. 651; Ex parte Bigelow, 113 U. S. 328; Re Nielson, 131 U. S. 176; Re Savin, 131 U. S. 267. In Re Cuddy, 131 U. S. 280, it was held directly, that where the pe-

titioner had been committed for a contempt, he was at liberty, upon application for a writ of habeas corpus, to allege and prove facts not contradictory to the record, which went to show that the court was without jurisdiction."

In Re Bonner, supra, the court used this language:

"From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced."

Respectfully submitted,

LAWRENCE MAXWELL,
JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
JOSEPH S. GRAYDON,
Counsel for Petitioner.

ADDENDA.

I.

The general statute against the introduction and sale of intoxicating liquors in the Indian country was superseded as to the Indian Territory by the special act of 1895, cited at page 10 of the Government's brief, which prohibited the introduction or sale of intoxicants into any part of the Indian Territory. The special act of 1895 was the only prohibitory law relating to intoxicating liquors enforced in the Indian Territory between 1895 and the admission of the State. The act of 1897 had no application to the Indian Territory because that territory was covered by the special act of 1895.

The Court of Appeals for the Indian Territory held that the act of 1895 was in full force after the act of 1897.

United States *vs.* Buckles *et al.*, 6 I. T. Rep., 322.

II.

It is claimed by the Government in their brief that Congress reserved the right to enforce laws relating to intoxicating liquors in the Indian Territory by treaty stipulations with the various tribes, but there is no such treaty or agreement with respect to the Cherokee Nation, where the alleged offense occurred, or the Choctaw or Chickasaw nations, and the agreement with the Seminole and Creek nations merely provided that the United States should maintain laws against the introduction and sale of intoxicants in those tribes without any declaration as to how long the same should be maintained by the United States. Petitioner contends that these treaty stipulations with the Seminoles and Creeks were ful-

filled when the Congress required the State of Oklahoma to enact and enforce stringent laws against the traffic in intoxicating liquors in that part of the State, formerly Indian Territory, and when the State accepting such condition incorporated it in its constitution.

III.

The reservation in section 1 of the Enabling Act, quoted at page 6 of petitioner's brief, by which the United States reserves to itself the authority to legislate with reference to Indians and their property, reserves only the authority of the Government to legislate with reference to the property of the Indians, excepting only their unrestricted lands. It is not a reservation of the police power.

Ward *vs.* Race Horse, 163 U. S., 504, involved a treaty with the Bannock Indians. It was provided that the Indians should have the right to hunt upon the unoccupied lands belonging to the United States, as long as game could be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

The Enabling Act of Wyoming provided that it should be admitted into the Union on an equal footing with the original States in all respects whatever, and the act contains no reservation or exception in favor of or for the benefit of the Indians. After its admission into the Union, the State of Wyoming passed certain laws protecting game. The defendant, Race Horse, went upon lands of the United States of the kind described in the Treaty, and there killed seven elk, which was an offense against the Criminal Laws of Wyoming. He was indicted for this, and brought *habeas corpus* in the Federal court, claiming that under the Bannock Treaty he had a right to hunt on these lands, and that the State law was void, because in conflict with the Treaty. This court held that as there was no reservation in the En-

abling Act of the State of Wyoming for the benefit of the Indians, that this, by implication, repealed the Treaty.

On page 510, the court gave the reason for the decision, which is as follows:

> "That 'a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary. Fong Yue Ting *vs.* United States, 149 U. S., 698; The Cherokee Tobacco, 11 Wall., 616. In the last case it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. Of course the settled rule undoubtedly is, that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. Cope *vs.* Cope, 137 U. S., 682, and authorities there cited. But in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction, by which both laws can coexist consistently with the intention of Congress. United States *vs.* Sixty-seven Packages Dry Goods, 17 How., 85; District of Columbia *vs.* Hutton, 143 U. S., 19; Frost *vs.* Wenie, 157 U. S., 46. The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty of it was construed as to allow the Indians to seek out every unoccupied piece of Government land and thereon disregard and violate the State law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule."

Office Supreme Court, U.
FILED.
APR 24 1912
JAMES H. McKENNA

No. 11 Orig.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, *Petitioner.*

Memorandum of Counsel in Support of Amended Motion for Leave to File Petition for Writ of Habeas Corpus.

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Of Counsel.

THE BARCLAY PRINTING COMPANY, 1018-1020 Elm Street, Cincinnati, O.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911.

EX PARTE CHARLEY WEBB, *Petitioner.*

Memorandum of Counsel in Support of Amended Motion for Leave to File Petition for Writ of Habeas Corpus.

The original motion for leave to file petition for writ of habeas corpus in this case was denied on April 8, 1912. The amended motion differs from the original motion by the addition of the contents of paragraph 5 contained in the amended motion.

In Matter of Heff, 197 U. S. 488, the court allowed a writ of habeas corpus to the District Court of the United States for the District of Kansas to reverse a judgment sentencing the petitioner to a term of imprisonment under the Act of January 30, 1897, 29 Stat. 506, being the same statute under which petitioner in this case is held in custody by the United States Marshal for the Eastern District of Oklahoma.

In in re Lincoln, 202 U. S. 178, denying petition for writ of habeas corpus, the court, speaking through Mr. Justice Brewer, said of Matter of Heff (p. 183):

> "It is true that we issued a writ of habeas corpus in case in some respects like the present, Matter of

> Heff, 197 U. S. 488, and it is relied upon by petitioner as authority for this application, but it was shown in that case that there was a direct conflict between the state and local Federal courts in the precise point of law involved, each asserting jurisdiction over the same offense; that the Court of Appeals had already decided the question adversely to the contention of petitioner, so that a writ of error from that court would have accomplished nothing; and further, that the matter involved opened up inquiry into questions of great significance affecting the respective jurisdictions of the Nation and the States over large numbers of Indians. There were special reasons, therefore, for our issuing a writ of habeas corpus and investigating the matter in that case."

The present case differs from In re Lincoln, Riggins vs. United States, 199 U. S. 547, and other cases in which the writ has been denied, and resembles Matter of Heff, presenting all the special reasons for issuing the writ which were present in that case.

The United States Circuit Court of Appeals for the Eighth Circuit has decided the question involved adversely to the contention of petitioner in United States Express Co. vs. Friedman, 191 Fed. 673.

The case presents a direct conflict between state and local federal authorities and "opens up inquiry into questions of great significance affecting the respective jurisdictions of the Nation and the States over large numbers of Indians."

The Act of January 30, 1897, c 109, 29 Stat. 506, absolutely forbids the introduction of intoxicating liquors into Indian country under all circumstances, except such as are introduced under authority in writing from the War Department or an officer duly authorized thereunto by the War

Department, and constitutes the introduction of any such liquors a misdemeanor.

In United States Express Co. vs. Friedman, supra, the United States Circuit Court of Appeals for the Eighth Circuit held that this statute had not been abrogated by the Oklahoma Enabling Act, but that it was in force and applicable to all that part of Oklahoma, which was formerly Indian Territory, a domain with a population of 1,600,000 people, including more than 100,000 Indians.

The Enabling Act of June 16, 1906 (c 3335, 34 Stat. 267), under which Oklahoma was admitted into the Union, provided that the Convention which was to form a constrtution for the state of Oklahoma should provide in said constitution;

> "That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State, now known as the Indian Territory. . . . is prohibited for a period of 21 years from the date of the admission of said State into the Union. . . . Provided, that the legislature may provide by law for one agency under the supervision of said State in each incorporated town of not less than two thousand population in the portions of said state hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State, such county shall be entitled to have one such agency for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes . . . and for the sale of alcohol for scientific purposes . . . and for the sale of such liquors to any apothecary, etc."

This provision was incorporated into the constitution of Oklahoma. In pursuance thereof an act of the legislature

of Oklahoma, known as the "Billups Law," entitled, "An Act to establish a state agency and local agencies for the sale of intoxicating liquors for certain purposes; and providing for referring the same to the people; prohibiting the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors, except as herein provided; providing for the appointment of an attorney, and for the enforcement of the provisions of this act; making an appropriation and declaring an emergency;" was approved by the governor on March 24, 1908; being sections 4156 to 4211 inclusive of the Compiled Laws of Oklahoma of 1909.

This statute was approved by the people on referendum vote and is in force.

Acting under the provisions of this statute the "State Agents" and local agents are authorized to introduce into and sell in that part of Oklahoma which was formerly Indian Territory intoxicating liquors for the purposes set forth in the act of the legislature. If, as decided by the United States Circuit Court of Appeals, the Act of 1897 is in force in this domain, it is the right and duty of the federal authorities there to enforce against State officials acting under the Billups Act, which is based on the provisions of the constitution and the Enabling Act, all enacted subsequent to the Act of 1897, the criminal provisions of that act.

It is therefore respectfully submitted that a public question of such importance is presented as to justify the issuance of the writ.

LAWRENCE MAXWELL,
JOSEPH S. GRAYDON,
Of Counsel.

Office Supreme Court, U. S.
FILED.
MAY 15 1912
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 11, Original.

EX PARTE CHARLEY WEBB, PETITIONER.

SUPPLEMENTAL BRIEF FOR PETITIONER.

LAWRENCE MAXWELL,
JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
JOSEPH S. GRAYDON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

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EX PARTE CHARLEY WEBB, PETITIONER.

SUPPLEMENTAL BRIEF FOR PETITIONER.

I.

The indictment cannot be sustained under the act of 1897 relating to Indian country, because when that general act was passed the Indian Territory was covered by the special act of 1895 (quoted in the brief for the United States at p. 10), and because the town of Vinita, where the alleged offense occurred, was not Indian country under any definition of that term, but was a Government townsite, without vestige of Indian title therein and free from all restraints on alienation. It is probably for this reason that, although the pleader had only the act of 1897 in mind and en-

dorsed it on the indictment, the Government argues that the indictment is based on the act of 1895.

II.

The act of 1895 is section 8 of "An act to provide for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes" (28 Stat., 693). It contains provisions for the division of that Territory into judicial districts; provides for terms of court, appointment of district attorneys, marshals, and deputies; makes the general criminal law and procedure of Arkansas applicable to the Territory, and contains other provisions applicable to said Territory as such. It is an act of Congress providing in detail for the government of a Territory of the United States. All jurisdictional provisions thereof are now transferred to the courts of Oklahoma or the United States courts in that State, and its criminal law borrowed from the State of Arkansas is superseded. If section 8 survived the Territory it is the only section that did survive.

It is contended that it survived by reason of the provision in section 21 of the Enabling Act that "the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States." Such a section is general in acts of Con-

gress providing for the admission of new States, and seems to be inserted for the purpose of not leaving doubtful the applicability of the general statutes of the United States relating to coinage, post-offices, etc. The section in itself does not indicate what laws of the United States are not locally inapplicable. The act of 1895 was locally inapplicable after statehood because when passed it was not contemplated that it should be in force except in the *Territory*.

Section 8 was a single provision in a general statute dealing with the political entity theretofore established as the Indian Territory. The offense dealt with in the section is the carrying of liquor into "said Territory." As stated in 22 Op. Att'y Gen'l, 232 (1898), "what is known and described in the statutes and generally as the Indian Territory was organized and described by metes and bounds by the act of May 2, 1890 (26 Stat., 81, 93, sec. 29), and the territory within those bounds is just as much a separate, distinct, integral part of the United States as is the State of Kansas or Territory of Arizona, etc."

In Oklahoma *vs.* A., T. & Santa Fe Ry., 220 U. S., 277, it was held that an act of Congress authorizing a railroad to be operated in Indian Territory and containing a prohibition against charging the inhabitants of said Territory a greater rate than was authorized by the laws of Kansas, was effective only while the *territorial* conditions lasted and did not survive statehood.

The Enabling Act provides that the "inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma." Prior laws of Congress relating to either of these former bodies politic as territories are not locally or otherwise applicable to the new government established by the people of both of them.

III.

It is contended that only intrastate traffic in liquors was placed within the jurisdiction of the State by the Enabling Act, leaving the interstate traffic within the jurisdiction of the United States. It may be assumed that Congress could have retained jurisdiction over the introduction of liquors into Indian country, to wit, lands to which Indian title exists, or to which title is held in trust by the Government or is inalienable by the allottee, but no such condition exists as to the *locus in quo*, and no act of Congress relating to any such lands was in force since the statute of 1895 anywhere in Indian Territory. Since the act of 1897 was never applicable, and the act of 1895 by its own terms ended with statehood, the new State came into existence in an equality with other States as to this subject; that is, with complete control over the internal traffic, and no less nor more control

over the interstate traffic than is vested in the other States.

If Congress intended to indicate that the new State was considered incompetent to control an important branch of its police power and was to remain in a state of tutelage for an indefinite period, Congress should have so provided in unmistakable terms.

Respectfully submitted,

LAWRENCE MAXWELL,
JAMES S. DAVENPORT,
THOMAS H. OWEN,
JOSEPH C. STONE,
JOSEPH S. GRAYDON,
Counsel for Petitioner.